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(27,181)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 426.

THE OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., February 9, 1920.

1 Court of Claims.

No. 33183.

THE OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On January 28, 1916 the claimant filed its original petition. Subsequently, to wit: July 8, 1918, by leave of court, the claimant filed its amended petition, which is as follows:

Amended Petition.

(Filed July 8, 1918.)

The Honorable Court of Claims:

The Oregon-Washington Railroad & Navigation Company, Claimant, respectfully represents:

I.

Claimant is a corporation duly organized under the laws of the State of Oregon, and as such corporation now is, and was during all the times hereinafter mentioned, engaged as a common carrier in the transportation of passengers and freight in and through various States of the United States, and, through connections with other railroad companies, between the points covered by the transportation services referred to herein. No part of the lines operated by claimant were constructed with the aid of grants of land by the United States.

II.

Under the Acts of Congress granting lands in aid of railroads and Acts of Congress regulating the expenditure of appropriations by the United States for Army transportation over such land-grant railroads, so far as same may be applicable, said land-grant railroads were required to transport troops and munitions of war and property of the United States at not exceeding fifty per centum of the rates paid by private parties for the same kind of service; but in none of said Acts were said land-grant railroads required, nor have they ever agreed, to transport at such reduced rates anything other than troops and munitions of war and property of the United States.

III.

At and prior to the times when the services hereinafter mentioned were performed, the railroad companies of the United States generally, including claimant, had severally agreed with the Quartermaster-General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transportation of property moved by the Quartermaster's Department, United States Army, and for which the United States Government was lawfully entitled to reduced rates over land-grant roads, (i. e., property of the United States,) the lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

3 Said agreements are known as "Land-Grant Equalization Agreements", and are set out in Circular No. 23, Quartermaster General's Office, 1911, dated November 15, 1911, and Circular No. 6, Office of the Chief, Quartermaster Corps, 1913, dated March 1, 1913, published by the Government.

IV.

Under the regulations of the War Department in force at the times hereinafter stated each and every officer of the Army, when changing stations, was entitled to the transportation, at the expense of the Government, of a certain weight of household goods or other personal property belonging to him, the weight being graded by his rank. Similar regulations obtained during the same time in the other Government Departments hereinafter referred to as to the transportation of like property and effects of officials of those Departments when changing stations; and Army officers upon assignment to station, or when changing station, were entitled to transportation, at the expense of the Government, of the number of private mounts (horses owned by them) for which they were entitled to forage, according to their rank.

V.

Within six years of the filing of the original petition herein, the United States, through the Quartermaster's Department of the Army, shipped as freight over certain railroads—claimant in each instance being the last carrier—certain weights of household goods and personal effects and other property of Army officers and other

4 officials of the United States changing station, the shipment in each instance being upon what is known as a Government bill of lading, calling for tariff rates, said bills of lading having been furnished by the Quartermaster's Department of the Army in accordance with a circular letter and forms prescribed and promulgated by the Comptroller of the Treasury and approved by the Secretary of the Treasury under date of October 29, 1907 (14 Comp. Dec., at p. 967, et seq.).

On the back of each of said Government bills of lading was printed (in accordance with the form prescribed as aforesaid by the Comptroller of the Treasury, 14 Comp. Dec. 971) the following, among other "Conditions and Instructions":

"Conditions.

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

"2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided herein.

"3. Shipments made upon this bill of lading shall take the rates provided for shipments made upon the uniform or standard bills of lading or standard receipts.

* * * * * * *

"Instructions.

"1. *Government property* [italics here ours] will be transported on the prescribed form of *Government Bill of Lading* which will be identified by serial numbers.

* * * * * * *

5 "3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

* * * * * * *

"7. *Public property* [italics ours] may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat. 111.)

"8. Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made. * * *"

Said Government bills of lading upon which the aforesaid shipments were made, and the "Conditions and Instructions" therein contained, embodied the well-established and long-continued prac-

tice of the United States and the common carriers by railroad in the United States, including claimant, by which shipments of freight by the Government over the railroads of the country (whether land-grant railroads or not) were accepted by the carriers without prepayment of the charges therefor and upon the understanding and agreement that, where no special rate was agreed upon, the service would be settled for, with the last carrier, upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance, as provided in the railroad land-grant Acts, and Army appropriation Acts of Congress so far as same were applicable, and the railroad Land-Grant Equalization Agreements, above referred to.

6 And claimant further says that, in accordance with the well-established and long-continued custom and practice of the parties, settlement for such freight transportation by the United States is and has always been treated and regarded by the United States and by said common carriers by railroad, including claimant, as a matter of accounting merely between the parties and not as determinative of the legal or contractual rights of the parties, or either of them, and that any error, either of fact or law, made by either of the parties in presenting or settling bills or vouchers for such freight transportation, if against the United States, was and is subject to correction by the Government at any time thereafter and the balance due the United States because of said error deductible from the amount due the carrier upon any subsequent bill or voucher before the accounting officers of the Government for settlement; and if the error were against the railroad company, the same might be corrected so long as settlement of the bill or voucher was within the control of the accounting officers of the Government, in view of certain statutory conditions and restrictions contained in 28th Statutes at Large, pages 205-211, but if control of the settlement had passed beyond the accounting officers of the Government, by reason of such statutory conditions and restrictions, the carrier was relegated to its suit in the Court of Claims to recover the balance due it for the transportation involved.

7 And claimant further says that in all such instances as are referred to herein, the compensation of the carrier was fixed by the aforesaid land-grant and Army appropriation Acts and said Equalization Agreements, as well as by the aforesaid Government bills of lading upon which the shipments were made (in the absence of any agreement to pay special rates, as was the case here), at the published tariff or commercial rates of the carriers concerned, less land-grant deductions when, and only when, authorized by said Acts and Agreements.

Prior to the commencement of this suit and for the period covered by the transportation embraced herein, claimant's auditors, erroneously and by mistake, rendered its bills or vouchers for the transportation of household goods and other personal property of Army officers and other government officials changing stations, shipped through the Quartermaster's department of the Army upon Government bills of lading, upon the basis of the tariff rates with deductions on account of land-grant distance involved, and claimant's

auditors so rendered its bills and vouchers for the transportation of that character embraced in this suit, although said deductions were not authorized or required by law or the bills of lading upon which the shipments referred to were made, and payment for said transportation was made by the United States only on that basis.

Claimant further says that, as it is advised and believes, its auditors and agents were led and constrained to render its bills and vouchers, as aforesaid for the transportation aforesaid, at tariff rates with land-grant deductions, because said shipments were for the Quartermaster's department of the Army and upon Government bills of lading which in terms are only applicable to "Government property" and "public property", and also the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within
8 the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates, per his decisions of June 29, 1901 (7 Comp. Dec. 852), October 13, 1904 (11 Comp. Dec. 174), and October 16, 1905 (12 Comp. Dec. 202), to which ruling the Comptroller of the Treasury adhered until the decision of the court in Chicago, Milwaukee & St. Paul Ry. Co. v. United States, 50 Ct. Cl. 412, decided February 8, 1915, wherein judgment was given to said company for the amounts deducted on account of land-grant distance from its bills for the transportation of the personal effects of Army officers within the change of station allowance.

Claimant further says that in rendering its bills or vouchers aforesaid for said transportation of officers personal property at tariff rates with land-grant deductions, and accepting payment on said basis, it did not waive nor did it intend to waive its right to payment in full for said transportation, nor was there any consideration for such a waiver, and claimant at all times intended to maintain and reserve its right to sue in this Court, if so advised, for the balances due it on account of said land-grant deductions, so far as the same were not barred by the statute of limitations, which right to sue it believed it was entitled to by law.

VI.

Annexed to the original Petition herein is a Statement showing in detail the items of transportation referred to in paragraph V of this petition and the balances due claimant because of deductions from
9 the tariff rates on account of land-grant distance made as aforesaid in settling claimant's accounts, and said statement is made a part of this amended petition by this reference. And claimant says that the total sum due it, as shown by said statement, because of the said land-grant deductions, is $4,600.67.

VII.

Wherefore claimant says there is now justly due and owing it by the United States the sum of $4,600.67 exclusive of all just credits

and offsets, for which it prays judgment, no assignment or transfer of said claim having been made.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
By CHARLES H. BATES,
Its Attorney in Fact.

HARR & BATES,
Attorneys for Claimant.

10 DISTRICT OF COLUMBIA, *ss:*

Charles H. Bates, of the District aforesaid, being duly sworn, deposes and says: That he is attorney in fact for The Oregon-Washington Railroad & Navigation Company in the presentation of the aforesaid claim; that he has read the foregoing petition by him subscribed for and in the name of said Company, and is acquainted with the contents thereof, and that the matters and things therein stated are true, as he verily believes.

CHARLES H. BATES.

Subscribed and sworn to before me this 6th day of July, 1918.

ALBERT C. WEST.
Notary Public, District of Columbia.

[NOTARIAL SEAL.]

Power of attorney annexed to original Petition.

11 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On April 1, 1919, this case was argued and submitted on merits by Mr. William R. Harr, for the claimant and by Mr. Horace S. Whitman, for the defendants.

12 IV. *Findings of Fact, Conclusion of Law and Opinion of the Court, by Downey, J.*

Filed May 5, 1919.

Findings of Fact.

I.

The Oregon-Washington Railroad & Navigation Co. is a corporation of the State of Oregon.

II.

Before any of the transactions involved in this suit, the railroad companies of the United States generally, the claimant company included, entered into certain agreements with the United States known as the "Land-grant equalization agreements," by which the carriers agreed, subject to certain exceptions not material here to be noted—

to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement.

III.

Under the provisions of various acts of Congress by which lands were granted to aid in the construction of railroads, and in which acts certain reservations and restrictions were made or authorized to be made by Congress respecting the charges to be made for the transportation of troops, munitions of war, and military supplies and property of the United States, and under the provisions of the annual Army appropriation acts, beginning with that approved June 30, 1882, ch. 254 (22 Stat., 120), down to the present time, such land-aided roads were authorized and required to be paid, for Army transportation of the character above mentioned, not exceed-
13 ing fifty per centum of the rates paid by private parties for like or similar service, except that for the fiscal year 1892 the Army appropriation act of February 24, 1891, ch. 284 (26 Stat., 776), permitted a maximum amount of sixty per centum to be paid; and the practice of the executive departments of the Government, under said Army appropriation acts, has always been to pay said railroads, for such transportation, the maximum amount allowed by said acts.

IV.

Under the Army regulations in force during the whole period of the transportation service involved herein and theretofore every officer of the Army, when changing station, was entitled to the transportation, at the expense of the Government, of a prescribed weight of baggage belonging to him, the weight being graduated according to rank and materially larger in case of permanent change of station than in case of temporary change in the field. There were some changes in the regulations during the period, but they are not herein material.

It was provided that in changing station the authorized allowance of baggage should be turned over to the quartermaster for packing and crating and for transportation as freight by ordinary freight lines, and that the baggage to be transported at public expense, including mess chests and personal baggage, upon change of station, should not exceed amounts shown in a tabulation, ranging, in case of permanent change of station, from 15,000 pounds for a lieutenant general down through the ranks in graduated amounts to 6,000 pounds for a captain, with further graduations for officers of lower rank.

By another provision transportation of professional books was authorized in addition to the allowances above referred to, and by another provision transportation was authorized of private mounts intended to be used in the public service and not in excess of the number for which the officer was entitled to forage.

By the Army appropriation act of March 23, 1910 (36 Stat., 243–255), under the subhead "Transportation of the Army and Its Supplies," it was provided "That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess," and thereafter it was provided in the Army Regulations that baggage in excess of the allowance would be shipped on the same bill of lading with the regulation allowances upon advance deposit with the shipping officer of a sum equal to the commercial freight charges on the excess.

The term "baggage" was not construed to limit the transportation to such personal belongings as travelers ordinarily carry with them, but was understood and construed to include household goods and other personal effects belonging to the officers and necessary to be transported for their use in the discharge of their official duties.

Similar regulations obtained during the same period in other Government departments.

V.

The transportation services involved in this case, rendered between January 7, 1910, and January 5, 1915, both inclusive, were rendered upon the usual Government bills of lading, the form and conditions of which were as follows:

SPECIMEN AND STANDARD FORMS.

<.....8".....>

[Form No. 1, obverse.]

<.....10½".....><.....3½".....>

Form No.....
Form approved by Comptroller of the Treasury....., 1907.
[device here.]
Government bill of lading.

No.....
DEPARTMENT OR BUREAU.

....., ..., 190
(Name of station.) (Date.)

Received from.....
(Consignor.)

y the.....company
(Name of transportation company.)

he public property described below in apparent good order and condition contents and value unknown) to be forwarded subject to conditions stated n the reverse hereof, from.....

).....by said company and its connections, here to be delivered in like good order and condition to.....
(Consignee.)

n.....
Route journey only when some substantial interest of the Government is subserved thereby.)

...ges.	Numbers.	Number and description of packages.	Contents.	Weights.		

.....*Agent.*

For.....
(Name of transportation company.)

Consignor's certificate of shipment.

_____, _____, 190
(Place.) (Date.)

I have this day shipped in accordance with this bill of lading the public property above enumerated.

Weight_____ lbs_____
(In words and figures.)

_____

_____
(Consignor.)

Consignee's certificate of delivery.

_____, _____, 190
(Place.) (Date.)

I have this day received from_____
Name
_____the above enumerate
transportation company.)
public property in apparent good ord
and condition, except as noted on th
reverse of this bill of lading.

Weight_____ lbs_____
(In words and figures.)

to be billed or vouchered to_____

_____
(Name and address of officer.)

_____

_____
(Consignee.)

[Form No. 1, reverse.]

No. _____

Bill of lading.

Payable from_____
(Appropriation.)

_____

Explanation regarding loss or shrinka
to be made by consignee, who will sta
all the facts available concerning the n
ture or extent of the loss or injury a
how it occurred.

_____

_____

_____

_____

_____

_____

_____

_____
(Consignee.)

_____

NOTE.—On these folds may appear such other information or instructions as may b
necessary for administrative purposes.

CONDITIONS AND INSTRUCTIONS.

CONDITIONS.

It is mutually agreed and understood between the United States and carrie
who are parties to this bill of lading that—

1. Prepayment of freight charges will in no case be demanded by carrier
Upon surrender of this bill of lading duly accomplished payment will be ma
to the last carrier, except where otherwise specifically stated.

2. For railway transportation this bill of lading is subject to all the cond
tions of the uniform or standard bills of lading, and for express shipments t
all the conditions contained in the standard form of receipt issued by expre
companies, except as otherwise specifically provided hereon.

3. Shipments made upon this bill of lading shall take the rates provide
for shipments made upon the uniform or standard bills of lading or standar
receipts.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. The shipment is at "owner's risk," or released rates where the tariff provides lower rates on that account, and at "company's risk" where the tariff makes no such provision.

INSTRUCTIONS.

1. Government property will be transported on the prescribed form of *Government Bill of Lading*, which will be identified by serial numbers.

2. *Through bills of lading will be issued in all instances between initial and ultimate points except when rates more advantageous to the Government may be otherwise secured.*

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that the shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

5. Erasures, interlineations, or alterations in bills of lading will be authenticated and explained by the person making them.

6. Bills of lading should describe shipments of articles by their commercial names, giving separately such weights, dimensions, or values and manner of packing as may be necessary to ascertain classifications and rates and to enable recovery on loss.

7. Public property *may* be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regualtions. (23 Stat., 111.)

8. *Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made.* Memorandum copies may be used at the discretion of administrative officers. Shipping orders shall be invariably furnished the initial carrier.

9. In no case will a second bill of lading be issued for any shipment, nor will a bill of lading be issued after the transportation has been performed.

10. In the absence of the consignee, or on his failure to receipt, the person receipting will certify that he is duly authorized to do so, reciting such authority.

11. In case the bill of lading has been lost or destroyed, the shipping officer will issue a certificate upon the application of either the carrier, the consignee, or the proper officer of the department, bureau, or office making the shipment. This certificate will be frowarded to the consignee, who will indorse thereon his certificate as to the receipt of the property and its condition. This certificate shall then become the substitute for the bill of lading, and payment may be made thereon. Record should be made of the loss of the bill of lading and of the issue of a certificate. The shipping officer will not give his certificate until he is satisfied himself, by correspondence with the consignee and the proper officer of the department, bureau, or office controlling the shipment, that the bill of lading is not in their possession. He will also require proper evidence of the carrier that the bill of lading is not in its possession and can not be traced by it, and a statement that if subsequently found it will be at once surrendered to the United States without demand. In case the bill of lading should subsequently be recovered, proper record will be made thereof and the bill forwarded to the proper officer.

12. To insure prompt delivery of property in the absence of the bill of lading, the consignee may give to the carrier a receipt for the property actually delivered, which will state that it is given because the bill of lading has not come to hand. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, the receipts will be recovered and destroyed by the officer who issued it.

13. In case of loss or damage to the property while in the possession of the carrier, such loss or damage should, when practicable, be noted on the bill of lading before its accomplishment. All practicable steps should be taken at that

time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer all evidence as to the same.

14. If the number of articles to be shipped be too great for the blank form, additional leaves or bills should be used and so attached and designated as to form but one bill, under one number. Additional instructions, not conflicting with the foregoing, may be added by any department, bureau, or office for the guidance of its officers. Additional information required solely for administrative purposes will appear on the brief and second fold.

No express contracts otherwise were made for the transportation here involved and no special rates were noted on the bills of lading.

Bills of lading covering shipments of the class here involved were "supposed" to carry notations informing the carrier of the nature of the shipment. Sometimes the designations were "household goods of officer" or "household goods." In "recent years," how recent not shown, the notation was in form "Property of Capt. Brown" or some named officer. Household goods "were usually billed in care of the officer entitled to receive the same" and the bills showed the officer "changing station." The exact form of notation on the bills of lading for the shipments here involved is not specifically shown and whether there were notations on all bills does not appear. It was the practice to put some appropriate notation on the bills. The bills here involved are not in evidence.

It is not shown that plaintiff was ever deceived or misled as to the character of these shipments and the evidence does not justify a finding that plaintiff's officer charged with the duty of presenting and collecting claims for the transportation here involved ever believed or had reason to believe that the property transported was Government-owned property.

VI.

In rendering its vouchers to the defendant for the transportation referred to in this case the claimant company made deductions on account of land grant from the amounts which would have been due therefor at commercial or tariff rates, and claimed only the balance, accepting payment in the sums so ascertained and claimed without protest.

The accounts were stated on the Government form of voucher for transportation of freight subject to land-grant deductions and were certified by plaintiff's auditor to be correct and just and were presented to and paid by the Government's proper disbursing officer, the amount paid equaling the ascertained and shown total of the amounts stated in the column headed "amount claimed."

The instructions upon this voucher form required that it should be completely filled in by the payee before certification and that there must not be any erasure or other alteration. If a voucher presented to a disbursing officer for payment was found to be erroneous in any respect the errors were noted thereon and the voucher returned for restatement. Restatement was accomplished by the preparation and certification of a new voucher with the error corrected.

The form of voucher referred to and used in the presentation of accounts for the services here involved was as follows:

Form No. 20 (Q. M.)
Approved by the Comptroller of the Treasury June 15, 1912

PUBLIC VOUCHER

FOR TRANSPORTATION OF FREIGHT

(LAND GRANT)

Transportation Co.'s Bill No......

Appropriation: .....

Voucher No......
Symbol No......
General Account.....
Detail Account.....

THE UNITED STATES,
To ..... Dr.

Address.....

Class symbol.	Date, 191	Bill of lading number.	From—	To—	Total distance.	Miles of land-grant road.	Class or commodity.	Weight.	Rate.	Gross amount.	Amount to be deducted account of land grant.	Amount claimed.	Payee must not use this column. Notations.
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Total.....													

I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received; and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at date of service.

Examined by

*(Do not sign in duplicate.)

Payee.....

(Bill must be completely filled in by payee before certification, and there must not be any erasure or other alteration whatever.)

I certify that the above services were rendered as stated; and that they were necessary for the public service.

....., 191

Title.....

(Any notations made in spaces provided therefor on back of this voucher become a part of this certificate.)

Approved for $.....

Title.....

Paid by check No....., dated ....., 191 , on .....
Treasurer of the United States at....., in favor of payee named.

*Where a voucher is certified by a corporation or company, the name of the person writing the corporate or company name, as well as the capacity in which he signs, must appear. Example: "Chicago Edison Company, per John Smith, Secretary," or Treasurer, or Member of Firm, as the case may be.

OBSERVE INSTRUCTIONS ON REVERSE HEREOF.

OREGON-WASHINGTON R. R. ETC., VS. UNITED STATES. 13

*Public Voucher No.*_____

_____DEPARTMENT

OFFICE OF_____

APPROPRIATION:

_____
(State full title of appropriation.)

*Amount, $*_____

IN FAVOR OF

_____
(Name of payee.)

FOR TRANSPORTATION OF FREIGHT
(Land grant.)

ACCOUNTS OF

_____
(Name of disbursing officer.)

*Disbursing*_____
(Clerk or agent.)

_____
(Place where located.)

_____, *191*
(Period for which account is rendered.)

INSTRUCTIONS.

1. Transportation companies, when billing on this form, are requested to indicate on accompanying bills of lading, opposite each item, the class or commodity rate applied, and refer to the tariff used. Where payment is demanded for a full car load or loads, the designation of the car by name and number should be shown, with the items shipped in each car. Where payment is demanded for services in a particular car or kind of car, the shipment by proper authority from initial point to destination in said car should be shown.

2. When additional charges, such as drayage, wharfage, tolls, etc., are made a part of this account, they must be stated separately on this form, and, if paid to other firm or corporation, to be supported by receipt.

3. Payment for transportation of freight will be made to the last carrier, unless otherwise provided in the bill of lading, upon this voucher form, accompanied by its corresponding accomplished bills of lading, and only for the quantity of stores delivered at destination, except that in case of loss of weight from natural shrinkage en route the weight shipped, as shown by the bill of lading, will be paid for, provided packages are delivered intact. Loss or damage for which a carrier is responsible will be deducted in making settlements for the services.

4. Separate forms will be used in billing transportation furnished for each bureau, office, or service of the respective Government departments.

5. All notations for purely administrative purposes will be made elsewhere on this form than in the bill rendered by transportation companies.

20 For the transportation here involved and for like transportation theretofore, claims for which were stated in the same way, the plaintiff company and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books the net amounts determined as above stated and claimed in its vouchers and no more, and upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded as (quoting the language of the company's auditor) "behind us."

VII.

For the transportation of the authorized change of station allowance of baggage, including household goods and other personal property of officers of the United States Army and other Government departments changing stations within the period here involved and within six years of the filing of the original petition herein, for which settlements were made by disbursing officers shortly after the services were rendered, the plaintiff, as last carrier, claimed and was paid by the United States rates arrived at by deducting from the lawful rates filed with the Interstate Commerce Commission the amounts authorized to be deducted by reason of the land-grant acts and the provisions of the applicable annual Army appropriation acts relating to the transportation of Government property over land-grant railroads.

Of the items of transportation set out in plaintiff's exhibit filed with its complaint herein, which number 176, 154 were for the War Department of Army officers' effects on permanent change of station, 10 were for the Marine Corps, 1 for the Navy, and 11 for miscellaneous branches of the public service.

Upon the shipments herein involved the difference between the amounts thus claimed and paid and the amounts the plaintiff would have received if paid at lawful tariff rates without land-grant deductions is $4,228.01. Of this sum, $204.59 is a difference occurring as above stated, on the transportation of Army officers' private mounts referred to in Finding IV.

VIII.

The Oregon-Washington Railroad & Navigation Co., plaintiff herein, and the Oregon Short Line Railroad Co. and the Union Pacific Railroad Co., plaintiffs in similar suits submitted herewith, compose what is known as the Union Pacific System, although such relation did not exist at the time in 1901, hereinafter referred to. None of said roads were land-aided railroads, but they were parties to the equalization agreements referred to in Finding II.

In rendering their accounts to the United States for the transportation of the property and effects of Army officers and other Government employees changing station within the weights authorized to be transported on Government bills of lading at the expense of the United States, said companies, prior to the time referred to in 1901, rendered all said accounts at net cost or land-grant rates, i. e. commercial rates less land-grant deductions, following what

they understood to be the practice of the land-grant
21 roads in this respect. But in 1901 the Union Pacific stated a claim against the United States at regular tariff rates for transportation of household goods and professional books of an officer of the Army over the railroad bridge at Quincy, Ill., and claimed regular tariff rates for such transportation. The auditor disallowed the claim, allowed the rate per mile paid to the railroads leading to the bridge, the railroad company appealed to the Comptroller of the Treasury, and the comptroller affirmed the action of the auditor. The claim as made and the action of the auditor are stated in the comptroller's decision as follows:

The railroad company claims that the Government should pay regular tariff rates on the private property of an Army officer transported over the Quincy bridge on a Government bill of lading.

The auditor, in settlement above indicated, for the transportation of the regulation allowance of the household goods and professional books of an Army officer, allowed for the Quincy bridge the regular rate per mile paid to the railroads leading to the bridge and disallowed the excess.

After this decision and, so far as shown, except for this particular account, the Union Pacific again stated its accounts for the transportation of officers' effects at land-grant rates. It is not shown that plaintiff company ever changed its method of stating these accounts because of this claim by the Union Pacific or during its pendency, but after said decision all of said companies continued to state their accounts at land-grant rates and accept payment at such rates without protest and continued so to do until shortly after the decision by this court of the Chicago, Milwaukee & St. Paul Railway Co. case, February 8, 1915. In that case, which was decided without opinion, and the findings in which are not published, this court rendered judgment in favor of the plaintiff for deductions made from commercial rates, on account of land grants, in making payment for the transportation of officers' effects. Findings I and II in that case were formal as to the corporate capacity of the plaintiff and equalization agreements. Finding III was as to the Army regulations and Finding IV was as follows:

In making payment to claimant for the transportation of the effects of certain officers since November 27, 1908, the accounting officers of the Treasury made deduction, from the amounts due for said transportation at ordinary commercial rates, on account of land grants, and paid to claimant only the same rates as were due to be paid for the transportation of property of the United States.

By reason of said deductions as shown in the appendix to the original petition filed herein, claimant has been paid four thousand four hundred and three dollars and eighty cents ($4,403.80) less than it would have received had it been paid for said transportation at the ordinary commercial rates.

Upon these findings judgment was rendered for $4,403.80. This suit, decided February 8, 1915, was commenced November 9, 1914.

After being informed, at a subsequent date not shown, of the decision of this court in that case the plaintiff stated its accounts for this

class of transportation at full commercial rates, but on June 30, 1915, in a case appealed from the auditor to the comptroller by another railroad the comptroller held that notwithstanding the decision of this court and because of specific limitations on the use of the money appropriated by Congress in the Army appropriation act for "transportation of the Army and its supplies," from which appropriation this class of service was payable, the accounting officers required to consider the availability of appropriations could not pay more than 50 per cent of commercial rates, which was land-grant rates, and thereupon plaintiff resorted to the practice of stating its bills
22 at land-grant rates and continued so to do until after the passage of the Army appropriation act of June 30, 1917, in which it was provided that the limitation on the use of the appropriation should not prevent the accounting officers from making full payment to land-grant roads for transportation where the courts have held that the property transported does not come "within the scope of the deductions provided for in the land-grant acts."

All of the transportation here involved was furnished and the accounts therefor stated before the decision of the Chicago, Milwaukee & St. Paul case.

IX.

The Union Pacific lines, of which plaintiff company is one, have been represented in Washington by the same attorney since November, 1901. Said attorney had for 10 years or more theretofore represented the Southern Pacific lines in Washington either as attorney or in association with their attorney. He is one of the attorneys of record in this case. His employment was in looking after the collection of compensation from the Government for transportation services and in assisting in the adjustment of disputes between the companies and Government officers, and these companies, plaintiff included, looked to him for advice as to the bringing of suits in the Court of Claims for disallowances made by the accounting officers or for balances due the companies.

The matter of land-grant deductions on this class of transportation first came to the particular attention of this attorney soon after the passage of the Army appropriation act of February 24, 1891, and in personal conversation with the first and second comptroller about that time he expressed the opinion that land-grant deductions should not be made except when the freight transportation was payable from the Army transportation appropriation, and the freight was the property of the United States, and that the personal property of Army officers was not such property. No appeal by the roads represented by him was then pending before either comptroller, nor was the question as to the rate to be applied to officers' personal effects then before them, but from statements then made and former decisions he came to understand that the accounting officers would apply land-grant rates to shipment of officers' effects on change of station, and he was informed by the then comptrollers with whom he discussed the matter, that if not satisfied with decisions, his redress was in the courts.

None of the roads represented by him rendered any bills for such transportation at commercial rates until the claim passed on in the Quincy Bridge case was so stated, and claimed as to bridge transportation by the Southern Pacific. In 1904 he sought to have the comptroller change the holdings as to the class of transportation subject to the restrictions of the act of 1891. The matter then before the comptroller involved other than Army transportation payment for which was not made from the Army appropriation, and no question was then before him as to the rate on Army officers' effects on change of station. In his decision the comptroller said:

If this were a new question, one that had not been passed upon time and again by my predecessors, I might take a different view of the meaning of the acts upon which they predicated their decisions. But to say that because I, at this late date, am not able to clearly see the reasons which actuated those whose duty it was to construe these laws, as they no doubt saw them, that because I can not so see them, that their construction is clearly wrong, is asking too much and giving too little respect to precedent. I am, therefore, constrained to affirm the decision of the auditor.

The Court of Claims is only in a modified sense bound by these precedents, and if these constructions have been wrong all these years the railroads are not without remedy and have not been for all these years.

Whether said attorney advised his clients that in his opinion the comptroller's holding, as he understood it, was incorrect, and that their remedy was in the courts or what view the plaintiff took, if it was so advised, does not appear from the evidence. The plaintiff continued to state and render its accounts, as elsewhere shown in these findings, and until the beginning of this suit has not questioned in any court the correctness of the settlements of its accounts as rendered. As to amounts involved the question was not then of so much importance as it became after 1908, because until their bonded indebtedness was paid off, the larger part of such transportation was over the bond-aided roads.

Conclusion of Law.

On the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be, and it is, dismissed.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court:

This action is for the recovery of various amounts, aggregating $4,288.01, in addition to those paid on account of 176 items of freight transportation furnished to and paid for by the United States. One hundred and fifty-four of these movements were for the War Department of the effects of Army officers changing station, 10 were for the Marine Corps, 1 for the Navy, and the remaining 11 for other branches of the public service. All the payments were made by dis-

leasing officers on vouchers certified to be correct and presented to them by the plaintiff. The vouchers, in addition to other data called for by the prescribed form which is in the findings, including weights and rate, stated the "gross amount" deduced therefrom, the amount deducted on account of land grant and, in the final column, the remainder, after such deduction, as the "amount claimed," they were all paid in the full amount claimed and such payment was accepted without protest. This action seeks to recover the difference between the amounts thus claimed and paid and the amount the plaintiff would have received had payment been claimed and made at commercial rates without any deductions on account of land grant, and the claim is for a sum as to each item of transportation in addition to that already claimed and paid as claimed for the same items and is not for any other or different or additional service nor for omitted items. The case therefore involves not only the question of the applicability of land grant rates to this class of freight transportation, a question already decided adversely by this court, but it involves further questions as to the right, under the circumstances of the case, to now recover amounts not then claimed. The findings are quite full as to the facts, much fuller, we fear, than is justified, for, in an effort to give the plaintiff the benefit of all of its voluminous requests for findings which seemed to even approach propriety, we
24 have likely incorporated matter beyond the proper scope of findings of fact. Some statements are accounted for by the fact that suits by other railroads mentioned are submitted with this one and one set of requests are made applicable to all.

The case seems to us to be clearly within the holding of this court in Baltimore & Ohio Railroad Co. v. United States (52 C. Cls. 468). The opinion in that case is lengthy, citing quite liberally from the authorities and we desire to do more than merely refer to it in the usual way as an authority in support of what is said here. We reaffirm what is said in that opinion on the question here involved, call attention to the authorities cited and to avoid lengthy repetition we treat it not merely as an authority but as a part of this opinion to be supplemented as further consideration and the facts of this case may justify.

The question as to the applicability of land-grant rates to this class of transportation may be regarded as settled adversely by the Chicago, Milwaukee & St. Paul Ry. Co. case decided by this court February 8, 1915. In the opinion in the B. & O. case we called attention to the fact that the questions there discussed were not presented to or considered by the court in the Chicago, Milwaukee & St. Paul case but we did not call attention to the findings in that case on which judgment was rendered, as we perhaps should have done. They are the findings of fact upon which the judgment was rendered and they show that the amount for which judgment was rendered was the amount of deductions made by the accounting officers of the Treasury from the amounts due for the transportation at ordinary commercial rates, a radically different case from that with which we have here to deal.

This statement prompts the suggestion that in dealing with ques-

tions such as we here have for consideration the distinction between disbursing officers and the accounting officers of the Treasury must always be in mind and, one step further, action by neither nor both of these classes of officers must be permitted to obscure the independent right of access to this court. Disbursing officers and accounting officers function along their own particular lines. They are related in that the accounts of the former must be submitted to the latter for settlement and in that a payment by a disbursing officer contrary to the holding of the comptroller as to the propriety of payments from the accountable funds which have been advanced to him will likely subject him to a disallowance by the auditor in the settement of his accounts, but there is jurisdiction in the accounting officers not possessed by the disbursing officers and a difference in the method of presenting claims. For the purposes of the discussion in the B. & O. case the distinction was not drawn or required as here.

During the period covered by the transportation involved in this case and for many years theretofore there were three methods finding authority in the law or in regulations or arising out of established governmental practice either of which might have been resorted to by the plaintiff and other railroads to secure compensation for services rendered, viz:

25 1. Presentment of claim to a disbursing officer for payment. This was the method pursued in this case. It has its chief advantage in that prompt payment is secured. Claims presented to a disbursing officer for payment must be upon a prescribed form, properly certified as to correctness by the claimant, and will only be paid when stated in the amount the officer is authorized to pay, since they must be used by the officer as his acquittances in rendering to the auditor his accounts as to expenditures from funds advanced to and charged against him. A disbursing officer will only pay when he understands he is authorized to pay under the decisions of the Comptroller of the Treasury, for such decisions will be applied by the auditor in examining his accounts and payments made in contravention thereof will be disallowed.

2. Presentment to the proper auditor for direct settlement. By this method claims may be presented for any amount or at any rate deemed proper by the claimant and the auditor may allow or disallow the whole claim or allow in part and disallow in part. The claimant may appeal to the comptroller for a revision of the action of the auditor in disallowing all or any part of the claim. The decision of the comptroller is conclusive on the executive branch of the government.

3. Suit in the Court of Claims. The Court of Claims has and for many years has had jurisdiction to determine the rights of claimants in cases of the character here involved and to render judgment irrespective of any decision by the Comptroller of the Treasury.

It appears that seven-eights of the transportation in question in this case was for the War Department and of officers' effects within the change of station allowance and the discussion has been addressed

entirely to this class of transportation. The other in minor amounts follows although as to it we have not been furnished with but left to our own resources as to regulations. It may be said that all the cases center around and are presented because of the transportation of Army officers' effects on change of station.

This class of property was first authoritatively determined not to be Government property within the meaning of the land-grant acts on February 8, 1915, when this court rendered judgment in the Chicago, Milwaukee & St. Paul case. That action was commenced November 9, 1914. Up to that time no railroad company had ever brought an action in this court to recover commercial rates for such transportation, and this plaintiff never brought an action until the instant case was commenced January 28, 1916.

The United States, in moving troops always and of necessity moved their equipage and supplies. That was Government-owned property. When an officer was required under orders to make a permanent change of station it was recognized that there were certain effects necessary for his use in the discharge of his official duties which, because not furnished by the Government, he must furnish for himself and which would exceed in weight the amount which could be carried by him in the regular way as baggage, and the right was granted him to have a limited weight of such effects called "baggage" transported to his new station at Government expense. The Gov-
26 ernment assumed this obligation just as it obligated itself for the expense of his personal transportation. There were regulations to that effect in force before there were land-grant railroads such as we here deal with. When land-grant transportation commenced this class of property was transported at land-grant rates without distinction in that respect between it and Government-owned property, and it does not appear, either in this case or from an examination of records and decisions, that there was any controversy over the matter. Rather is the inference authorized that it was a mutual construction of the rights of the parties.

In the B. & O. case much stress was laid upon the contention that the comptroller had decided that the transportation of such property was subject to land-grant deduction and we therein said that we had not been referred to any decision of the comptroller and that an exhaustive search indicated that there had been no decision on a disputed question so holding. Of course, the different comptrollers had always entertained that view and applied that rule, as was well understood, but there had been no holding to that effect in an official decision wherein the specific point was contested, the fact cited going not to the question as to whether that was the view of the comptrollers and the rule applied by them, but to the point that the railroads were not, in an official way at least, contesting but were acquiescing in that view. A decision of the comptroller as late as 1904 (11 Comp. Dec. 174) was cited wherein the Illinois Central Railroad Co. appealed to the comptroller from a decision of the auditor applying land-grant rates to the excess over the regulation allowance of an officer changing station, the comptroller holding that the excess was not subject to land-grant deduction, and wherein the railroad company made no

question as to the regulation allowance, although the question was there if it cared to present it, but confined its contention to the excess, in effect conceding the correctness of the rule as to the regulation allowance.

We have given plaintiff's counsel the benefit of requested findings, of very doubtful propriety, as to conversations with the comptrollers beginning in 1891, at which time he testifies his attention was first called to the matter, and of the requested fact that from statements made to him and former decisions he came to understand that the accounting officers would apply land-grant rates to this class of transportation and that he expressed a contrary view. Let us see what is to be inferred from and where we are led by the facts presented.

We should perhaps recall in this connection and for possible desired reference hereafter that by Army appropriation acts in 1874 and 1875 Congress had prohibited any payments from the appropriations made to land-grant roads but authorized suit in the Court of Claims, which followed by two railroads and, on appeal, the question involved was decided by the Supreme Court (93 U. S., 442). The bill of particulars filed in this court in one of the cases, there being no itemized bill in the other, contains a list of the property transported for which compensation was sought and of some interest is the fact that amidst a mass of items of Government-owned property, presumptively, are items of "baggage" and "private
27 baggage," without distinction in the plaintiff's asserted rights with reference thereto. Thereafter Congress, in the Army appropriation act of June 30, 1882 (22 Stat., 117) provided for the payment for "Army transportation," due to land-grant roads under the decision of the Supreme Court, limiting the payment to 50 per cent of tariff rates, to be accepted in full and providing "that any such land-grant roads as shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services as herein provided." The same provision was repeated in the deficiency act of August 5, 1882 (22 Stat., 257–262), and on May 2, 1883 (First Comptroller Lawrence held that—

> This statute was evidently designed to make all laws to conform to the decision of the Supreme Court and to make payment for all services accordingly, any doubt which might arise upon the language of the statute is to be resolved in favor of making it conform to the decisions of the Supreme Court * * *.

The Army appropriation act of February 24, 1891 (26 Stat., 776), repeated the above provision as to payment of amounts due and provided for payments out of the appropriation for "Army transportation" to land-aided roads at rates deemed just and reasonable by the Secretary of War not exceeding 60 per cent of commercial rates, limited in later acts to 50 per cent. Second Comptroller Mansur, October 26, 1893, referring to the decision of First Comptroller Lawrence, held that the provision in question "was intended to cover all property transported on behalf of the Government."

It is these decisions that counsel refers to as confirming him in the belief that if the comptrollers would hold that Government transpor-

tation not payable out of the Army appropriation was subject to land-grant deductions they "certainly would require land-grant deductions to be made from all transportation charges payable out of said Army appropriation acts, *as were household goods and other personal property.*" (Italics ours.) Much later, in 1904, when counsel "sought to have the comptroller change the holding of his office" as to the class of transportation to which the restrictions of the act of 1891 applied, the question before the comptroller, presented by a company represented by this counsel, was as to transportation not payable from the Army appropriation. The recital is unfortunately lengthy but the situation presented and the conclusion forced goes to the merits of counsel's theory. If when he was having conversations with the comptrollers in 1891 and subsequently, with these holdings as the text, he contended that land-grant rates were not applicable to movements of Army officers' effects changing stations, and by our findings we import verity to his statement in that respect, he was discussing purely a moot question for it was not before either of the comptrollers in either of the cases referred to.

It may be concluded that the purpose in presenting these facts by counsel's own testimony and requesting findings based thereon is to establish, first, the understanding that the comptrollers would hold this class of transportation subject to land-grant deduction, second, nonacquiescence by him in the correctness of the holding, and, third, the futility of seeking compensation at other than land-grant rates at the hands of disbursing or accounting officers.

The first proposition may be conceded. And, further, it may be taken as settled, irrespective of specific decision, that it was
28 the view of all the comptrollers that this class of transportation was subject to land-grant deductions, that wherever they have referred to the question they have so stated and that that view of the law by them was well understood by everybody having to do with such matters.

The second proposition, if to be regarded as a proper subject for discussion, leads us too far into the personal equation. The personal opinion of one standing in the relation of local attorney to railroad companies having their usual quota of executive and legal officers surely can not avail against an established line of conduct extending over a long period of years. The strength and value of that opinion is to be considered in the light of uninterrupted practice by the employer and the fact that although employed to look after the collection of compensation due from the Government and looked to to advise as to suits for disallowances and for balances due, it does not appear whether the client was ever informed of the personal opinion entertained or whether suit was ever advised. If so the client must have disregarded the opinion as well as the advice, for it continued through many years to claim only land-grant rates and did not avail itself, if not satisfied therewith, of its right to test the question in the courts. Under such circumstances the plaintiff's course of conduct is the determining factor and the personal opinion of counsel is not for consideration.

As to the third proposition, what can it now avail plaintiff to assert

the futility of demanding a different rate at the hands of disbursing or accounting officers? Many times, in the argument of cases of this character, have we heard it urged that the railroads, in presenting their claims to disbursing officers for payments were in effect forced to present them at land-grant rates, because the disbursing officers would not pay on any other basis, and so, in this case, we are told that the railroads "merely billed the Government for what they understood the accounting officers would voluntarily pay, reserving their right to sue for the amount deducted on account of land grant." More confusion of disbursing officers, accounting officers, and "deductions."

So far as the claims in this case are concerned we are not dealing with the accounting officers nor with "deductions" in the sense in which that word is used in association with the acts of those officers and the distinction is important to be borne in mind. We talk of deductions or disallowances when claims are presented to auditors for settlement and when, in this class of cases, claims having been made at full commercial rates there is a "deduction" by the auditor of the amount of land grant and a "disallowance" of that much of the claim. All the deductions there were in these cases were made by the claimant before the claim was presented and they were simply mathematical processes necessary to determine the "amount claimed." A commercial or full tariff rate must be used as the basis of determining, by computation and deduction, a land-grant rate and the data required to be shown on the voucher under "distance," "miles of land grant," "weight," "rate," "gross amount," and "amount to be deducted" are simply the elements entering into the determination and for verification of the correctness of the "amount claimed." There was no reservation of any kind and no protest when payment was made, and it may be conceded that as pay-
29 ment was made of the full amount claimed there was then no room for protest. Under these circumstances plaintiff is maintaining that it can, for a long period of years, acquiesce, by its every action, in the views of Government officials as to the basis on which it is entitled to be paid for such services, state its accounts continuously on that basis, certify the correctness of the amounts claimed and claim no more, receive payments in full of the amounts claimed, close its books as to the separate transactions and after many years of such procedure, not by reason of any successful showing as to a misapprehension of the facts but because of some indefinite sort of an alleged mental reservation, procure an additional payment not theretofore claimed on account of the same service, and that too after some other company has contested and established a right under a different procedure.

We think the proposition answers itself. But aside from the situation as thus presented and notwithstanding counsel's assertions as to his own belief in the matter, we can but conclude from this long-continued uniform course of action by plaintiff that during all those years it had no intention of claiming anything more as to these transactions than that claimed in the certified vouchers and paid. All the facts justify this conclusion, for a course of conduct is more potent

than assertions of belief unacted on. But if such a conclusion were otherwise subject to question it appears from the evidence that the plaintiff's charge upon its books was only of the amount claimed in its vouchers and that when that amount was paid "the transaction was behind us." The quoted language is the language of plaintiff's auditor.

Applying the conclusions in the B. and O. case and the stated reasons therefor and the authorities cited this case might well rest here, but we are met with so much of contention on various propositions not only in this but in other cases of like character now under submission, we are prompted to attempt to cover the whole field.

The different methods of asserting claims against the Government have been outlined. We may assume that railroad companies, having so much to do with such matters and having employees whose duty it is to look after them not only should but in fact do understand them. It is argued to us, in attempts to escape the effect of past performance, that in stating vouchers for payment by disbursing quartermasters there was no option but to state them at land grant rates because such officers would pay them only when so stated and, ergo, such method of statement was compulsory. The argument is without force. We have shown, we think, that they were in fact so stated because that was all that was claimed and there was no intention to claim more, but if in fact the plaintiff believed more was due and intended to claim more it could easily do so by presenting its claim to the auditor instead of the disbursing officer and in so presenting it it could claim commercial rates or whatever it saw fit to claim.

As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land grant rates, disallowing the excess, and it was understood to be useless to appeal to the comptroller. True enough; and so far as payment was concerned the result would have been the same. But plaintiff, thus securing for itself the same actual payment, would have been in the attitude of asserting, through the proper channels, its claim to compensation at a different rate, it need not have appealed to the comptroller if it regarded it as a vain thing, and the doors of this court were always open to it to test its right to recover what it had claimed and been refused and to establish by precedent its rights as to future transactions. It would then have been in the attitude of suing for something it had claimed and which had been refused it by the auditor and not of claiming something more on account of closed transactions as to which its course for many years had conformed to established practice and as to which it had been paid all it claimed.

In this connection we call attention, without repetition, to what is said in the B. & O. case on the subject of estoppel, equitable or quasi, the splitting of causes of action, the mistake, if mistake there was, as a mistake of law and not of fact, the necessity, particularly in Government matters, that there shall be finality and an end to accounting and the authorities cited. In connection with the authorities cited in that case much is now made in the argument of the cases

before us, of the fact that we failed to cite therein two cases decided by this court, viz: Great Northern Railway Co. v. United States (42 Ct. Cl. 234), and Finney v. United States (32 Ct. Cl. 546.) The first of these cases seems to us to have involved a mistake of fact as to the land-aided character of the 2.18 miles of road involved. In the second, carefully considered, we find nothing in conflict with the views expressed in the opinion in the B. & O. case or in this opinion. Rather, by reason of the facts does it tend to confirm them. But what if it be conceded that there are authorities tending to support different conclusions than those arrived at in that case, there are other authorities, we know, which might have been cited in support of the conclusions reached, there are doubtless many others which our limited resources did not develop and it is but in line with our common experience to find authorities apparently in support of both sides of a proposition. We accept, in such circumstances, the weight of authority applicable to the case in hand.

In the B. and O. case we discussed, as to the accounting officers, the effect of the presentment of a claim and acceptance of payment upon an attempt to thereafter assert a demand for further compensation growing out of the same transaction, except in case of fraud or mistake, and suggested the application of the principle when resort is had to this court. It did not occur then to suggest the application of the same principle in this court, not merely by analogy, but by the specific provisions of sections 178 and 179 of the code, repeating the provisions of sections 1092 and 1093, Revised Statutes. Section 178, provides that payment of the amount due by any judgment of this court shall be a full discharge of all claims touching any of the matters involved in the controversy, and section 179 provides that any judgment against a claimant shall bar any further claim arising out of the matters involved in the controversy. The plaintiff could not, as to any transaction involved herein, present a claim to an auditor at commercial rates and, on allowance of the claim less land-grant deductions, accept the amount allowed and have his appeal to the comptroller as to the balance. This is not mere accounting practice, it is the law (the Dockery Act, section 8, 28 Stat. 208). It should be self-evident that it can not nullify the law by claim-
31 ing and receiving from a disbursing officer what it understood the officer would voluntarily pay and have adjudication by the accounting officers as to a further sum. Likewise it is apparent, not only on principle but by express provision of statute that it could not, in this court, sue for compensation on a land-grant basis recover its judgment and accept payment and, afterwards, perchance after another decision in another case, sue for additional compensation as to the same transaction. The whole Government scheme as to determination and payment of such claims is involved in these three authorities, disbursing officers, accounting officers, and courts, and it would seem entirely subversive of fundamental principles to hold that a course of conduct which would be conclusive as to a part of the system finds some sort of a hiatus therein beyond which it is relieved from the effects of its course of conduct and reinvested with abandoned rights. Of course this proposition has no bearing upon

the question of a right of action in this court for a disallowed part of a claim properly made.

Preliminary to the discussion of one or two remaining questions it is proper to give attention to the effect, if any, of Finding V, setting out, in compliance with a request of plaintiff, the usual Government form of bill of lading, used in these cases, and for that matter, in all shipments on Government account. Significance is attempted to be given to the use of this form and its descriptive words "public property" as importing a representation as to the ownership of the property, deceiving the carrier and leading to the application of an erroneous rate. In the light of the evidence and the statements of some of the witnesses, voluntarily placing themselves in the attitude of seriously reflecting on their own intelligence, it is difficult to regard the contention seriously.

Theoretically, if the theory is to be of any avail, the railroad companies, this plaintiff, for all these years, even if we do not go back of 1891 when the attention of counsel herein was first called to the matter, believed this class of property was Government-owned property and, not having informed us specifically as to just when they learned to the contrary, we must assume that it was not until this court decided the Chicago, Milwaukee & St. Paul case, even though no such question was in that case.

Counsel can scarcely contend that he did not know the facts as to this property in the light of his testimony and the finding based thereon that in conversations with comptrollers at that remote time he contended that land-grant rates were only applicable when "the freight was property of the United States and the personal property of Army officers was not such property," and in the light of his knowledge of the whole situation through succeeding years, including the decision of the comptroller in 1904, referred to by him, in which the comptroller was asked to and did apply a different rate to the excess over the regulation allowance all involved in the same shipment and ownership. And if counsel knew the situation all these twenty or twenty-five years, as he undoubtedly did, it would be an unjustified reflection on him to assume that he permitted the companies he represented to proceed to their disadvantage under such a mistake of fact. But further discussion is unjustified. There is no room for doubt that the railroad companies generally, plain-
32 tiff included, knew full well the character of this property. What some subordinate clerk doing merely clerical work knew or didn't know is highly immaterial. And the use of a Government form of bill of lading can certainly avail the plaintiff nothing unless it was deceived thereby as to its rights. Such a contention is wholly untenable.

The case is, in our opinion, clearly foreclosed by what has been said, indeed by much less than has been said, but, although not necessary to its determination, we want to suggest two further questions.

In Finding V, following the form of bill of lading, it is said that "No express contracts otherwise were made for the transportation here involved." We were requested to find that "no contracts other than the Government bill of lading were made."

The bills of lading made no contracts as to the specific compensation to be paid. Under them proper tariff rates were the basis and the law required the deduction therefrom of land-grant if the shipments were within the land-grant acts. It does not appear that anything but land-grant rates was ever applied in the settlements for transportation of this kind until subsequent to all the transportation involved in this case. It is conceded to have been the established practice to pay all railroads, the plaintiff included, at land-grant rate as Government-owned property. If, with knowledge of its true accepted without protest. When a shipment of such property was tendered or, limited to this case, when the carrier accepted them knowing that it would be paid at land-grant rates, made no claim for any more and, because of that fact and because when paid, it considered the transaction closed, it is to be assumed that it never expected to be paid any more. It knew this was the basis on which the Government expected it to furnish the transportation, it had acquiesced therein continuously and these particular transactions followed a long established practice. To us it seems that the facts raised an implied contract to furnish the transportation at land-grant rates.

A different view of contract relations would result as follows: The position of the Government, through its accounting officers, well known to the carriers, was that the class of property here involved was quasi public property and entitled to transportation at the same rate as Government-owned property. If, with knowledge of its true character and of this construction, it was accepted on a Government bill of lading as "public property," then, if the fact that a Government form of bill of lading was used is material, does it not follow that there was a resultant contract obligation on the part of the carrier to transport it as public property and at the rate applicable thereto?

After the decision by the Supreme Court of the Land Grant cases Congress appropriated to pay the railroads what might be found due for services rendered, limiting payments to 50 per cent of tariff rates, which "shall be accepted in full for all demands for said services" and providing:

That any such land-grant roads as shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services as herein provided.

Whether any such acceptances were ever filed is not shown and is, we think, immaterial.

33 Appropriation acts for each fiscal year thereafter appropriated for "Army transportation" one limiting payments to land-grant roads to 60 per cent of tariff rates but all others limiting it to 50 per cent and all providing that such payments should "be accepted as in full for all demands for such service." The appropriation act for the fiscal year 1910, the first year within which service sued for herein was rendered (35 Stat. 732–745) appropriated under the subhead "Transportation of the Army and its supplies" and provided "that in expending the money appropriated by this act" land-grant roads shall be paid for the transportation of

"troops and munitions of war and military supplies and property" only on the basis of such rate as the Secretary of War shall deem just and reasonable, "not to exceed 50 per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation, *and the amount so fixed to be paid shall be accepted as in full for all demands for such service.*" (Italics ours.) The same provision is found in the appropriation acts for all years covered by the claim herein. The maximum within the limitation has always been paid.

We need not discuss established rules with reference to the use of appropriated funds. They are available only for the purposes for which appropriated and a given service can be paid for only from the available appropriation.

This appropriation was available for the transportation of officers' effects on change of station, was always construed as available therefor by officers authorized to determine such questions, was the only appropriation available for such purpose and every payment made to plaintiff on account of such transportation involved in this suit was made from that appropriation. It may safely be assumed that this plaintiff and all other railroads knew that this was the appropriation from which they were paid for such transportation, but that is in fact immaterial under the rule of presumption as to knowledge of the law.

And it can not affect the question to contend that this transportation is not within the classes of transportation referred to in the limiting clause or is not within the land-grant acts. The provision is, first, a limitation on the use of appropriated funds, and second, a condition attached to acceptance of payment therefrom. It in effect says to any land-grant road, when you accept a payment from this appropriation you must do so upon the express condition that it is in full for the services rendered. How then may it have the benefit of money, as to the expenditure of which Congress is authorized to impose conditions, and repudiate the condition?

For the reasons stated in the opinion in Baltimore and Ohio Railroad Company v. the United States, supra, and in this opinion, we conclude that the plaintiff can not recover. Its petition will therefore be dismissed with judgment against the plaintiff for cost of printing the record to be taxed by the clerk.

Hay, Judge, Booth, Judge, and Campbell, Chief Justice, concur.

Barney, Judge, did not participate.

34 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fifth day of May, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the Oregon-Washington Railroad and Navigation Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this

action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the Oregon-Washington Railroad and Navigation Company, as aforesaid, the sum of One Hundred and Thirty-six Dollars and thirty-one cents ($136.31), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. *Proceedings After Entry of Judgment.*

On May 20, 1919, the claimant filed a motion for amended and additional findings of fact. This motion was overruled by the Court on June 2, 1919.

VII. *Claimant's Application for, and Allowance of, an Appeal.*

Comes now the claimant, by its attorneys, and prays the allowance of an appeal to the Supreme Court of the United States from the judgment of the Court rendered herein May 5, 1919.

Respectfully submitted,

HARR & BATES,
Attorneys for Claimant.

Filed June 17, 1919.

Ordered:
That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

June 17, 1919.

35 Court of Claims.

No. 33183.

THE OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court, by Downey, J.; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Nineteenth day of June, A. D., 1919.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,181. Court of Claims. Term No. 426. The Oregon-Washington Railroad and Navigation Company, appellant, vs. The United States. Filed June 25th, 1919. File No. 27,181.

FREE COPY

DEC 7

JAMES D.

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad & Navigation Company, *Appellant*,
vs.
The United States.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Claimant.

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SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad & Navigation Company, *Appellant*, *vs.* The United States.	Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

Statement of the Case.

January 28, 1916, appellant brought this suit in the Court of Claims, to recover certain balances, amounting to $4,600.67, due it for the transportation for the United States of certain weights of household goods and other personal property, known as the "regulation change of station allowance", all of which were the private property of certain army officers and other Government officials, and which had been transported by said carriers pursuant to certain bills of lading issued by the Quartermasters department of the Army.

The form of bill of lading used was that known as the "Government bill of lading", approved by the Comptroller of the Treasury in 1907, a copy of which is set out in Finding of Fact V of the Court of Claims

(Rec., 9-12), and which in terms is applicable only to the transportation of "public property".

Of the 176 items of transportation involved, 154 were for the transportation of Army officers' effects on permanent change of station, 10 for the Marine Corps, 11 for the Navy, and 11 for miscellaneous branches of the public service. (Rec., p. 15.)

At the time referred to herein the amounts of officers' private property authorized by the Army Regulations to be transported at public expense ranged from 15,000 lbs. for a lieutenant general to 6,000 lbs. for a captain, with further graduations for officers of lower rank. In addition, the professional books of Army officers and a certain number of private mounts were authorized to be transported at public expense. Similar regulations obtained in the other Government departments. (Rec., p. 8.)

For the aforesaid transportation appellant, as last carrier, billed the Government at tariff rates, as called for in said bills of lading, less the deductions on account of land-grant distance required to be made by the railroad land-grant laws and the railroad land-grant equalization agreements where troops or property of the United States was transported, and its said bills were settled by the Government on that basis. (Rec., p. 12.)

Claimant was *not* a land-grant road, but was a party to the land-grant equalization agreements. (Rec., p. 15.)

The balances sought to be recovered in this suit are the amounts deducted by claimant on account of land-grant distance, as aforesaid. The transportation involved covered the period between January 7, 1910, and January 5, 1915, but only balances due on transportation services rendered within six years of the filing of the petition were claimed.

At the time these accounts were rendered and paid, it was well known to everybody concerned, including claimant, that it would be useless for the carriers to render their bills for transportation of this kind at full tariff rates without land-grant deductions. (Rec., pp. 21, 23, 25.)

It was not claimed or shown, or found by the Court of Claims, that the Government was in anywise prejudiced by the action of the claimant in rendering its bills at land-grant rates as aforesaid.

The Court of Claims, while holding that the railroad land-grant and Army Appropriations Acts did not authorize or require reduced rates to be given by the railroads on this class of transportation, nevertheless held that appellant was estopped from bringing suit in the Court of Claims to recover the balances referred to and dismissed the petition, although the suit was filed within six years from the time the transportation services involved were rendered. From said judgment claimant appealed to this court.

Findings of Fact made by Court of Claims.

The Court of Claims made certain findings of fact (Rec., pp. 7-18), which included those above stated, with the exception that the fact that it would have been useless for the appellant to have presented its accounts for the transportation at full tariff rates is not stated in its findings of fact although it is stated in the opinion of the court (Rec., pp. 21, 23, 25).

The court refused to make other findings requested by the plaintiff and overruled claimant's motion for amended and additional findings. (See Stipulation

filed in this court November 15, 1920, and printed as an Appendix to this Brief, p. 33, *et seq.*)

Additional Findings of Fact Requested by Claimant.

The judgment of the Court of Claims is to the effect that the claimant, as last carrier, having rendered its accounts to the United States for the transportation referred to herein at land-grant rates, and having been paid by the United States for such transportation at said rates, is estopped by reason of such facts from suit in the Court of Claims to recover the amount deducted by claimant on account of land-grant, although (as held by that court in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 50 Ct. Cl. 412, decided February 8, 1915) the property transported was not property of the United States, but private property, and the United States was not entitled to have it transported at less than full commercial rates under the Railroad Land-Grant Acts.

To avoid this plea of estoppel, the claimant adduced certain evidence going to show that the settlement of claimant's accounts by the Department were not regarded as absolutely final and conclusive between the parties, but subject to be reopened later, as the facts and the law warranted. The Court of Claims having failed to cover these points in its findings, although requested so to do, claimant requested certain additional findings of fact setting forth this understanding, between the carriers and the auditing officers of the Government, growing out of the practice. (See Stipulations, Appendix hereto, Proposed Additional Findings X and XI, pp. 33, 35, *et seq.*)

Claimant also requested the court to make an additional finding of fact to the effect that the Government

had not been prejudiced by the action of the claimant, during the period in question, in rendering its bills for the transportation involved at land-grant rates. Substantially the said request had been made in claimants original request for findings of fact. (See Stipulation, Appendix hereto, pp. 42, 47.)

Each of said requested additional findings of fact were overruled by the court (see Stipulation, p. 48 of this brief), which made no findings whatever upon the points covered thereby.

These requested findings of fact are properly before this court on this appeal under the following rule of this court governing appeals for the Court of Claims, adopted at its December Term, 1869 (9 Wall. VII):

> "RULE 5. In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer then such prayer and refusal shall be made a part of the record, certified on appeal, to this court."

Specifications of Error.

Error is assigned to the action of the Court of Claims in denying the petition, on the facts as found by the Court of Claims, and also to the action of the Court of Claims in overruling claimant's request for the additional and amended findings of fact set forth in the Stipulation between the parties.

ARGUMENT.

I.

Theory of Claimant's Case.

Paragraph V of Claimant's Amended Petition alleged (Rec., pp. 3-4) that—

> "Said Government bills of lading upon which the aforesaid shipments were made, and the conditions and instructions therein contained, embodied the well-established and long-continued practice of the United States and the common carriers by railroad in the United States, including claimant, by which shipments of freight by the Government over the railroads of the country (whether land-grant railroads or not) were accepted by the carriers without prepayment of the charges therefor * * * upon the understanding and agreement that, where no special rate was agreed upon, the service would be settled for, with the last carrier, upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance, as provided in the railroad land-grant Acts, and Army appropriation Acts of Congress so far as same were applicable, and the railroad Land-Grant Equalization Agreements, above referred to.
>
> "* * * that, in accordance with the well-established and long-continued custom and practice of the parties, settlement for such freight transportation by the United States is and has always been treated and regarded by the United States and by said common carriers by railroad, including claimant, as a matter of *accounting* merely between the parties and not as determina-

tive of the legal or contractual rights of the parties, or either of them, and that any error, either of fact or law, made by either of the parties in presenting or settling bills or vouchers for such freight transportation, if *against the United States*, was and is subject to correction by the Government at *any* time thereafter and the balance due the United States because of said error deductible from the amount due the carrier upon any subsequent bill or voucher before the accounting officers of the Government for settlement; and if the error were *against the railroad company*, the same might be corrected so long as settlement of the bill or voucher was within the control of the accounting officers of the Government, in view of certain statutory conditions and restrictions contained in 28th Statutes at Large, pages 205-211, but if control of the settlement had passed beyond the accounting officers of the Government, by reason of such statutory conditions and restrictions, the carrier was relegated to its suit in the Court of Claims to recover the balance due it for the transportation involved."

Claimant further alleged in its amended Petition (Rec., 4-5):

"* * * that in all such instances as are referred to herein, the compensation of the carrier was fixed by the aforesaid land-grant and Army Appropriation Acts and said Equalization Agreements, as well as by the aforesaid Government bills of lading upon which the shipments were made (in the absence of any agreement to pay special rates, as was the case here), at the published tariff or commercial rates of the carriers concerned, less land-grant deductions when, and

only when, authorized by said Acts and Agreements.

"* * * * that, as it is advised and believes its auditors and agents were led and constrained to render its bills and vouchers, as aforesaid for the transportation aforesaid, at tariff rates with land-grant deductions, because said shipments were for the Quartermaster's department of the Army and upon *Government* bills of lading which in terms are only applicable to "Government property" and "public property", *and also (because) the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates,* * * * *.

"* * * that in rendering its bills or vouchers as aforesaid for said transportation of officers' personal property at tariff rates with land-grant deductions, and accepting payment on said basis, it did not waive nor did it intend to waive its right to payment in full for said transportation, nor was there any consideration for such a waiver, and claimant at all times intended to maintain and reserve its right to sue in this Court, if so advised, for the balances due it on account of said land-grant deductions, so far as the same were not barred by the statute of limitations, which right to sue it believed it was entitled to by law."

II.

The presentation of claimant's accounts for the transportation services involved at commercial rates less land-grant deductions, does not, under the circumstances of this case, estop it from suing for the balances lawfully due therefor in the Court of Claims within the six-year period of limitation.

The essential facts of this case are to be gathered, not only from the findings of fact made by the Court of Claims, but from its opinion in this case and the decisions of the Comptroller of the Treasury. This is so because the Court of Claims' findings of fact fail to cover the case fully, and its opinion indicates the existence of certain material facts not found, of which we believe judicial notice may be taken.

The claimant contended, and sought to show, in the court below, as the opinion of the Court of Claims indicates, that the attitude of the Government accounting officers in respect to this class of transportation, following the decisions of the Comptroller of the Treasury, was such, and had been for many years, that it was useless for it to present its accounts for the services in question at full commercial rates, and the Court of Claims finds this situation actually to have existed. Thus, in its opinion in this case, the Court of Claims, said (Rec., p. 23):

> "The first proposition [the understanding of the railroads, including claimant, that the Comptroller of the Treasury would hold this class of transportation subject to land-grant deduction] *may be conceded.* And, further, *it may be taken as settled,*

> irrespective of specific decision, that it was the view of all the Comptrollers that this class of transportation was subject to land-grant deductions, that wherever they have referred to the question they have so stated *and that that view of the law by them was well understood by everybody having to do with such matters.*"

Again, the Court of Claims in its opinion said (Rec., p. 25):

> "As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land grant rates, disallowing the excess, *and it was understood to be useless to appeal to the comptroller. True enough; and so far as payment was concerned the result would have been the same.*"

And in an earlier part of its opinion the Court of Claims said (Rec., p. 21):

> "Of course the different Comptrollers had always understood and applied that rule, *as was well understood.*"

It is important to note, in this connection, that Judge Downey, who delivered the opinion of the Court of Claims in this case, had himself been Comptroller of the Treasury before being appointed to the bench of that court and was Comptroller from May 16, 1913, to August 31, 1915, during which period a large part of the transportation involved herein occurred. He therefore speaks *ex cathedra.* In addition, when Comptroller he expressly recognized the rule referred to. (20 Comp. Dec. 575, 577, and 21 Comp. Dec. 482, 483.)

The first published decision of the Comptroller of the Treasury announcing this "well understood"

view and position of the Comptroller of the Treasury is apparently that of October 13, 1904 (11 Compt. Dec. 174), which contained this statement (ib., 175-6):

> "It has been recognized that an officer in the discharge of his duties requires a greater amount of personal belongings than that which the carriers will transport free on a regular ticket. Therefore the Army Regulations provide that the Government will transport at its expense for him a certain fixed amount, called a 'change of station allowance'—in this case 6,000 pounds. This can be done only on the theory that such baggage is necessary for the officer in the discharge of his duties. *The property so authorized becomes invested with a quasi public character, and as such the railroad is under obligation to transport it on the same terms as other Government property.*"

By statute the decisions of the Comptroller of the Treasury are made binding and conclusive upon the Executive Departments of the Government.

In this connection it is to be noted that, as found by the Court of Claims (Rec., p. 18, Finding of Fact IV), this question as to the applicability of land-grant rates to the class of transportation here involved did not become "of so much importance as it became after 1908 because until their bonded indebtedness was paid off the larger part of such transportation was over the bond-aided roads" (Rec., p. 18, Finding of Fact IX).

Prior to that date, and thereafter, according to the decision of the Comptroller of the Treasury of October 13, 1904, above cited, and the opinion of the Court of Claims in this case, it was well known to everybody concerned that it was useless to bill the Government for transportation of the personal belongings of an Army officer changing station at other

than land-grant rates. And the record distinctly shows that this was also the understanding of the attorney who represented claimant and the other Union Pacific lines as well as the Southern Pacific lines, at Washington, D. C., in the presentation and collection of the accounts of said railroads for Government transportation (Finding of Fact IX, Rec., 17-18).

It appears, therefore, from the opinion of the Court of Claims, that everybody concerned in these transactions, at the time these accounts were presented to the Government for payment knew that it would be *useless* for the carrier to present its bills for the transportation in question at full commercial rates, as the Comptroller would only allow, and the accounting and disbursing officers could only pay, land-grant rates therefor.

This being so, the claimant should not be held estopped to assert its claim to the balances lawfully due it for such services by suit in the Court of Claims within the period of limitations fixed by statute, no matter in estoppel being pleaded or shown and no element of accord and satisfaction being involved.

As a matter of fact the Court of Claims has itself repeatedly decided that, under such circumstances, the claimant is not estopped from suing in the Court of Claims for the balances due him.

Thus in *Pickley* v. *United States,* 46 Ct. Cl. 77, 91, where receipts had been given, the court said:

> "It is further contended by the Government that the receipts given by the claimant are an acquittance of any further demand under these contracts, and numerous authorities from our own courts are cited in support of this contention, and from an equal number from the same courts are

cited in opposition. It would serve no good purpose to enter into a discussion and analysis of these numerous cases and we shall not do so. *At the time these receipts were given there was no dispute between the parties as to the amount due the claimant; the Comptroller of the Treasury had decided that the amount received was all that was due, and the paymaster could pay no more, and the claimant knew this. Quite likely he was led to believe that no greater sum was due him, but if so, as we decide, he was mistaken. There was no settlement or accord and satisfaction between the parties, because there was nothing to settle and no difference between them to accord, and hence there could have been no consideration for receipting for a sum less than was actually due.*

"Under the authorities as we understand them we do not believe that the claimant is barred from recovering the balance which we find was honestly his due under the terms of the contract. (*Glavey* v. *United States*, 182 U. S. 595, 607-608; *Fire Insurance Association* v. *Wickham*, 141 U. S. 579; *Bostwick* v. *United States*, 94 U. S. 53; 12 Ct. Cls., 68; *Kiskadden* v. *United States*, 44 C. Cls., R. 205, 219; *Murdock* v. *United States*, 216 U. S. 494."

See also *Pennsylvania* v. *United States*, 36 Ct. Cl. 507, in which it was held, as stated in the headnote:

"Estoppel for failure to present a claim cannot be set up by the party whose officers decided that presentation was a useless procedure."

In that case the Court of Claims also pointed out that estoppel "cannot rest by mere silence upon a departmental rule adverse to jurisdiction, with no addi-

tional rights acquired by a claim and no injury done to the debtor in the meantime."

A case very similar to the one at bar is *Great Northern Ry. Co.* v. *United States*, 42 Ct. Cl. 234. That was a suit to recover deductions on account of land-grant made in the quarterly settlements of claimants accounts without question by the claimant for many years, upon the theory that a certain portion of the road was land-aided, when it was not, yet the Court of Claims held that it was entitled to recover the balances so deducted.

We quote the following from the opinion of the court in that case (42 Ct. Cl. 238):

> "For more than twenty years prior to the filing of the petition herein the plaintiff company, under contract with the United States through the Post-Office Department, carried the mails of the United States over its said leased lines of road, and settlements were made therefor quarterly with the Post-Office Department, in which settlements the Department treated the said line of road from University Switch to the Minneapolis Union Depot as a part of said land-grant road, and made the ordinary land-grant deductions for carrying the mails over that portion of the road, which amounted in the aggregate to $1,110.37, for the recovery of which the plaintiff instituted this suit.
>
> "The defendants concede that the plaintiff company has a 'just and meritorious claim for judgment' for the sum stated, unless it has lost its right to recover therefor by reason of its own laches 'and by reason of its failure to assert its rights at the proper time and in the proper manner.'

"The basis of the defendant's contention is set forth in the last finding, as follows:

" 'Prior to the time of filing the present claim and instituting the present suit, and for upwards of twenty years prior thereto, the claimant company made quarterly settlements with the Post-Office Department and received pay for the services rendered by said road in connection with the transportation of the United States Mail between the points involved, on the basis of land-grant for the entire distance between such points of St. Paul and Minneapolis; and at the time of said settlements receipted in full to the United States therefor, and at no time up to the filing of this claim before this court ever formally demanded of the Post-Office Department any additional compensation for said service.' "

The estoppel thus pleaded was disposed of by the court as follows (42 Ct. Cl. 239):

"The contention of the defendants, that the plaintiff company is estopped by its conduct in accepting the sums profferred by the Government in payment of its claim for mail service without a protest, needs but little comment. 'Estoppel in *pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' (Bigelow on Estoppel, 4th ed., 445; *Henshaw* v. *Bissell*, 18 Wall., 255; *Bryant* v. *Virginia Coal and Iron Company*, 93 U. S. R. 326.)

"It is needless to say that the record in this case contains nothing to show that the defendants were in any way misled to their injury by the conduct of the plaintiff. On the contrary, it appears that

by the change in the route, so as to pass partly over the non-land-grant line, the Government paid less than it would have paid over the continuous land-grant road. Hence no change of position could possibly have been induced by the conduct of the plaintiff to the detriment of the defendants.

"For these reasons the plaintiff is entitled to recover in the sum of $1,110.37, for which judgment is ordered to be entered."

It will be observed that in that case, as here, the claimant company had accepted payment of a less amount than was due it under its contract without protest, and that such practice had been long continued. *Moreover, in that case the company had given the Government a receipt in full for the transportation involved,* (which was not done in the case at bar). Yet the Court of Claims upheld the claim.

"Estoppels are not favored defences except when their technicality can be subordinated to equity." *Cape Ann Granite Co* v. *United States,* 20 Ct. Cl. 1.

The case at bar, like that above cited of the Great Northern Railway Company, also falls under the principle announced by this court in *Chicago and Northwestern Ry. Co.* v. *United States.,* 104 U. S. 680, that, where the right to a larger sum than was paid existed under the law and the contract between the parties, the acceptance of a smaller sum in settlement without protest is immaterial. In that case this court said (p. 686, italics ours):

"Of course, if it was not the intention of the act of Congress referred to, to affect the contracts

of the company, the erroneous interpretation of them by the Postmaster-General, and his action under it, cannot give to them any different effect, for the rights of the parties depend on the law itself. And the performance by the company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; *and that whether it had protested against the erroneous construction of the law or not.* For it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so, without prejudice to its lawful claim, *leaving the ultimate right to future and final decision.* It was not the case of a voluntary payment of an illegal exaction, wherein the maxim, *consensus tollit errorem*, prevents a recovery; because in such case there is the legal presumption of an abandonment of the claim. *Volenti non fit injuria.* But here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and cannot, therefore, be a bar to either."

In the pending case the claimant company was equally bound, by law and its contracts, to carry the household goods and other personal property of Army officers and other Government officials, when offered them by the shipping Quartermasters of the Army, and it had a right to rely on the provisions of law and the terms of its contracts for the proper adjustment of its compensation, and was not pre-

cluded from claiming the full amount due for such transportation, under the law and its contracts, simply because it accepted payment of a less amount, without protest, from the disbursing officers or the accounting officers of the Government, especially when, as held by the Court of Claims, it would have been useless, so far as payment was concerned, for it to have presented its accounts for this transportation without land-grant deductions.

The *Railway Mail Service Cases* (13 Ct. Cl. 199; 103 U. S. 703), cited in the opinion of the Court of Claims in the *Baltimore & Ohio Railroad* case (52 Ct. Cl. 468), —a similar case to the one at bar and the opinion in which is relied upon by the court in this case—falls clearly within the principle of estoppel. Thus, in the opinion of this court affirming the judgment of the Court of Claims in that case, it is said (103 U. S. 704):

> "If the claimant, during all this time stood by contentedly *and saw the money which it now claims paid to the other company*, and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover, and thus make the government pay twice."

In the case at bar there was no contention on the part of the Government that it has been prejudiced by the attitude of the railroads. On the contrary, the Government has profited by the failure of the companies to sue earlier in the Court of Claims for full tariff rates, to the extent of the items that are barred by the statute of limitations and by the use by the Government of the amounts now claimed. Moreover, as above stated, appellant expressly requested a finding by the Court of Claims on the question of prejudice, but its request was overruled.

III.

Part Payment Alone did not Satisfy the Debt.

"Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release *under seal* or *no new consideration given.*"

1 Cyc. 319, citing in note many State cases and the following United States cases:

Fire Ins. Ass'n. v. *Wickham*, 141 U. S. 564.
United States v. *Bostwick*, 94 U. S. 53.
Murdock v. *Dist. of Col.*, 22 Ct. Cl. 464.
Baldwin's Case, 15 Ct. Cl. 297.
Latapee v. *Pecholier*, 2 Wash. (U. S.) 180, 14 Fed. Cas. No. 8,101.

"If payment of a less sum for a debt is not satisfaction, *although the creditor has agreed to accept it as such*, still less will it operate as satisfaction when he has not so agreed."
People v. *Hamilton County*, 56 Hun. (N. Y.) 459, 10 N. Y. Suppl. 88.

In *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 577, this court said:

"The rule is well established that where the facts show clearly a certain sum to be due from one person to another, the release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover

> the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the large sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In *James B. Finney* v. *United States*, 32 Ct. Cl. 546, it was held that the acceptance by the claimant of the amount authorized to be paid him for certain flour furnished the Government, which was less than that rightfully due him under his contract, did not deprive him of his right to sue in this court, as contended by the Government, which relied on the Act of July 31, 1894, Sec. 8 (28 Stat. L. 207), providing that any person accepting payment under a settlement of an auditor of the Treasury Department "shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted," unless the acceptance by the claimant of a less sum than that claimed was by way of accord and satisfaction.

In disposing of this case the Court of Claims said (32 Ct. Cl. 554-5):

> "It is well-settled law that where a certain sum is due, payment of a part will not operate to satisfy the whole debt, even where a release of the entire sum is given, unless such payment be made and accepted upon some new consideration. (*United States* v. *Bostwick*, 94 U. S. 53, 67; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 577).

"And to constitute a new consideration it must be so regarded by both parties, and this was the view of the court in *Philpot* v. *Gruninger* (14 Wall. 570, 577), cited with approval in the case of *Fire Ins. Assn.* v. *Wickham*, (*supra*).

"In this latter case it is further stated that 'to constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one.'

"In respect of claims disputed by the Government, there is a class of cases holding in effect that, where a claimant voluntarily submits his claim for adjustment to the proper department or to a board appointed for that purpose, and the amount found due thereby is accepted and a receipt given therefor in full, that bars any further claim. (*United States* v. *Adams*, 7 Wall. 463, 479; *Mason* v. *United States*, 17 Wall. 67; *Murphy* v. *United States*, 104 U. S. 464).

"In the latter case, which was a claim for damages growing out of an alleged violation of a contract for excavating a pit for a dry dock, the court held that 'acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy in his adjustment of the account presented to him was equivalent to a final settlement and compromise of all the items of the present claim included in that account.'

"In the case at bar, however, the claim was not an unliquidated one, as the ascertainment of the amount due was a mere matter of computation, nor was it presented as a disputed claim, so far as it appears from the averments in the petition."

Such is the situation in these household goods cases, now before this court. There is no question here of accord and satisfaction. Claimants merely billed the

Government for what they understood the accounting officers would voluntarily pay, reserving their right to sue for the amount deducted on account of land-grant when they saw fit, which right was subject only to the statute limiting the period for suit in this court for the balances due on the respective bills of lading, and which bills of lading required payments at certain specific rates of charge, thus constituting liquidated claims against the United States.

IV.

The settlements referred to herein were simply matters of accounting and not of contract, and hence subject to subsequent correction and restatement by the carrier subject only to the limitations of time fixed by law.

The liability of the Government was fixed by the bills of lading, which constituted the contracts between the parties—not by the vouchers stating the amounts due. If a voucher were erroneously stated by the carrier, a supplemental bill could, under well-settled practice, be submitted to the Department concerned at any time prior or subsequent to the cashing of the check or warrant issued by the Government in payment thereof, except only that, in the case of a warrant issued in payment of an allowance authorized by an auditor of the Treasury Department, cashing thereof would preclude a further allowance by the accounting officers of the Treasury, in which latter event the carrier was relegated to suit in the Court of Claims for any balance due, and said suit was subject only to the statute of limitations and to any matter pleaded by way of estoppel or accord and satisfaction where those features existed.

Settlement by the Government's accounting officers of a carrier's claim for transportation, whether payment was accepted under protest or not, has never been held by this court (nor by the Court of Claims until recently) of itself sufficient to estop the carrier from recovering any balance due it by suit in the Court of Claims within the statutory period.

In further support of this view we refer to Claimant's Requests for Additional Findings of Fact XI and XII and Brief therein, which requests the Court of Claims overruled (see Stipulation hereto annexed, pp. 33, 35, *et seq.*, of this brief).

We also call attention to the several settlements of railroad accounts made by the Auditor for the War Department, set forth in support of these Requests (see Stipulation, Appendix, page 37, *et seq.*, of this brief).

Said settlements show that it is the practice of the accounting officers of the Government to reopen *settled* accounts with the railroads for transportation as occasion may arise, even though several years may have elapsed, and to deduct from any pending account of the carrier amounts that may have been overpaid it in settling such prior accounts.

It is manifest, therefore, that the accounting officers of the Government do not treat these settlements as final, but hold they are entitled to reopen a railroad's account for transportation rendered the Government whenever, in their judgment, it appears that an overpayment, *for any cause whatever*, has been made the railroad for any particular service, or a payment not warranted by law.

V.

An account stated or SETTLED is only prima facie evidence of the extent of the liability of the debtor, and may be impeached for fraud, omission or mistake IN LAW or fact.

In *Perkins* v. *Hart*, 11 Wheat. 237, 256, this court said:

> "The rule is the same in principle at law; a settled account is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness or mistake *in law* or in fact; * * *."

In *Burrill* v. *Crossman*, 91 Fed. 543, the Circuit Court of Appeals for the Second Circuit, speaking by Judge Wallace, said (pp. 544-5):

> "* * * An account stated is a mere admission that the account is correct. If the party to whom it is rendered omits to communicate objections to the party rendering it within a reasonable time, an inference may be drawn that he was satisfied with it; but there is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account thus rendered. An account settled is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never precluded from giving evidence that the account did not include all the demands between them, unless the case is brought within the principles of an estoppel *in pais*, or of an obligatory agreement between the parties; as, for instance, where

> mutual compromises are made. *Lockwood* v. *Thorne,* 18 N. Y. 285; *Stenton* v. *Jerome,* 54 N. Y. 484. A stated and settled account is only *prima facie* evidence of its correctness. 'It may be impeached by proof of unfairness or mistake in law or in fact; and, if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it.' " *Perkins* v. *Hart,* 11 Wheat. 237.

In *Chicago, M. & St. P. Ry. Co.* v. *Clark,* 92 Fed. 968, the Circuit Court of Appeals for the Second Circuit, speaking by Judge Lacombe, held, as stated in the headnote:

> "A party to whom an account is rendered is not concluded by acquiescence therein, *or even by settlement in accordance therewith,* from proving the incorrectness of the account, *unless the statute of limitations has barred his right or the case is brought within the principle of an estoppel in pais* or of an obligatory agreement between the parties."

This case contains an extended review of the authorities bearing upon the conclusiveness of settled accounts.

And it is held that the rule as to the presumed accuracy of an account stated "*does not apply to the party who furnishes the account;* that as to him it is open to explanation for *any* omission or mistake."

> 1 Cyc. 370-371, notes 77, 78, 79.
> *Schettler* v. *Smith,* 34 N. Y. Super. Ct. 17.
> *Wilson* v. *Douse,* 140 Ill. 18; 29 N. E. 726.
> *Rayburn* v. *Mason Lumber Co.,* 57 Mich. 273; 23 N. W. 811.

VI.

The Rule as to Mistake of Law relied upon by the Court of Claims has no application here.

The rule as to mistake of law is usually invoked where a party seeks relief from some instrument he has executed, or from some payment that he has made, or from some action that he has taken, on the ground that he executed such instrument or paid such money or took such action while laboring under a mistake as to his legal rights in the premises. Such are *Bank* v. *Daniel*, 12 Pet. 32, and *United States* v. *Edmonston*, 181 U. S. 500, relied on by the Court of Claims. But such is not the case here. This claimant is not seeking to avoid the execution of a release or other instrument executed by it in favor of the Government, or any other action on its part purporting to release the Government from any further liability for the balances due it on account of the transportation involved, on the ground of a mistake of law as to its legal rights in the premises. No such release was ever given by it. The most it did was to certify that the accounts rendered by it were "correct and just, that the services had been rendered as stated; that payment therefor has not been received, and that the rates charged were not in excess of the lowest net rates available for the Government based on tariffs effective at the time" (See Form of Certificate to Public Voucher, &c., p. 13), all of which were true, as far as it went.

The situation here is that *the Government* is endeavoring to avoid responsibility for the balances due claimant under this plea of mistake of law, having set up, by way of defense to this suit, that the claimant

rendered its bills for less than the full amount due it by mistake as to its full legal rights in the premises. This claimant denies, and there is no finding by the court to any such effect. On the contrary, the fair presumption from what the Court of Claims said in its opinion, and from the allegations of the petition, is that claimant was not laboring under any mistake as to its legal rights, but merely rendered its bills at land-grant rates because it knew the disbursing and accounting officers of the Government, following the Comptroller's views and decisions would not pay full commercial rates therefor, although in some instances, and probably at first, it or some of its officers might not have known that the property shipped was not Government property, which would be a mistake of fact.

But even if claimant had been laboring under a mistake as to whether the Government was entitled to land-grant rates on this class of transportation, that fact would not preclude it from recovering any balances due, since the debt owing it by the Government was not entirely extinguished by part payment only. Claimant would be entitled to recover the balances due by suit in the Court of Claims within the statutory period, unless the failure of the claimant to claim the full amount in the first instance can be said to have so prejudiced the Government as to make it unjust and inequitable for the claimant to maintain a suit for the balances, which it is clear from this record is not the case here, no matter in estoppel being pleaded or proved.

Perkins v. *Hart*, 11 Wheat. 237, 256.
Pickley v. *United States*, 46 Ct. Cl. 77, and other authorities above cited.

Even where applicable the rule as to mistake of law is not favored:

> "The rule that money paid under a mistake of law cannot be recovered back often acts partially and inequitably and is regarded with so much disfavor by the courts that it will not be extended beyond the limits defined for the scope of its operation. The tendency of the courts is to treat mistakes as to legal rights as mistakes of fact or mistakes of mixed facts and law, wherever it is possible to do so without disturbing well settled precedents."
>
> *Ward* v. *Ward*, 12 Ohio Civ. Dec. 59; 30 Cyc. 1314.

Utermehle v. *Norment*, 197 U. S. 40, 56, cited by the Court of Claims in support of its theory that the rule as to mistake of law applied to the case at bar, was in fact a case where the party seeking the relief was held to be estopped from making a claim to a decedent's estate because he had accepted benefits under the will.

In *Central Pacific R. R. Co.* v. *United States*, 28 Ct. Cl. 427; affirmed 164 U. S. 93, also relied on by the Court of Claims, the Post Office Regulations expressly required that the department's inspectors be transported free by railroads contracting to carry the mails, and the acquiescence by the carriers in that continuing demand was held to estop it from subsequently claiming compensation for transportation services so rendered. But in the case at bar the contract between the carrier and the Government provided that the carrier should be paid *tariff rates* for the transportation involved, subject only to deductions on account of land-grant distance involved, when the transportation was

of *public property*, which this transportation admittedly was not; furthermore, no demand is shown to have been made by the agents of the Government shipping this property that the carrier transport the same at land-grant rates, and there was no such demand.

VII.

No Estoppel by Reason of the Provisions in the Army Appropriation Acts.

The further suggestion in the opinion of the Court of Claims in the *Baltimore & Ohio Railroad* case that claimant was estopped by the provisions in the several Army Appropriation Acts to the effect that payment thereunder, at the reduced rates therein named for Government transportation over land-grant roads (fifty per cent. of the rates paid private parties for similar transportation) should be accepted as in full for all demands for such service, is met by the fact that the restrictions in those Acts have no reference to anything other than the transportation of *troops and property of the United States*. (See Finding of Fact III, Rec., p. 7. See also, 25 Comp. Dec. 520-523, where the Railroad Land Grant Acts and Army Appropriation Acts are reviewed, and the established practice stated.)

Manifestly, in order for a land-grant road to be estopped by receipt of payment, under said Acts, of less than the full commercial rate, the transportation must fall within one of the classes of transportation named therein. And equally clear is it that the household goods and other personal property of Army officers or other Government officials is not property of

the United States. Besides, this suggestion of the Court of Claims is met by its action in giving judgment for the claimants in cases of this kind where express protest against land-grant deductions is shown. Protest would avail nothing if the provision in the Army Appropriation Acts referred to were applicable and controlling.

Under the Railroad Land-Grant Acts neither Congress nor the Comptroller of the Treasury is authorized to require the railroads to transport, at such reduced rates, persons who may be *potentially* troops of the United States, or who have ceased to be troops of the United States, such as applicants for enlistment in the Army, discharged soldiers, etc., although the United States has an interest in such transportation and may pay the expense thereof (*Union Pacific R. R. Co.* v. *United States*, 249 U. S. 354, affirming 52 Ct. Cl. 226). By the same reasoning said Acts cannot be held to authorize either Congress or the Comptroller of the Treasury to require the railroads to transport *private* property of officers of the Government at reduced rates, on the theory that the Government has some interest in the movement and thereby such property is imbued with a *quasi* public character.

And so the Court of Claims held, when this question came before it, as shown by the following quotation from its opinion in this case (Rec., p. 19):

> "The question as to the applicability of land-grant rates to this class of transportation may be regarded as settled *adversely* [to the Government] by the *Chicago, Milwaukee & St. Paul Ry. Co.* case decided by this court February 8, 1915."

No appeal was taken by the United States in that case.

Notwithstanding the opinion of the Court of Claims in said case of the *Chicago, Milwaukee & St. Paul Ry. Co.*, the Comptroller of the Treasury subsequently held that he was precluded by the restrictive provisions in the annual Army Appropriation Acts from paying for the transportation of officers' personal property and effects at other than the rates applicable to the transportation of Government property (Decision of Comptroller of Treasury of December 14, 1915, 22 Comp. Dec. 263, adhered to in his decision of June 30, 1915). Whereupon Congress, in the Army Appropriation Act approved August 29, 1916 (39 Stat. 619, 634), added the following proviso after the usual restrictive provisions as to the payment for Army transportation over land-grant roads:

> "*And provided further*, That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

A similar proviso has been contained in all subsequent Army Appropriation Acts (40 Stat. 54; ib. 477). And since these provisos were added the Comptroller has been paying for the transportation of household goods and other personal property at full commercial rates.

This action of Congress should be taken as declaratory of the original meaning of these restrictions in the Army Appropriation Acts. Surely Congress never intended that said restrictive provisions should pre-

clude the disbursing and accounting officers of the Government from paying the land-grant railroads in full for transportation which did not come within the scope of deductions provided for in the land-grant Acts.

VIII.

Officers' Private Mounts.

The transportation of officers' private mounts, involved in this case, amounting to $204.59 (Rec., p. 15, Finding of Fact VII) was *the authorized statutory change of station allowance* (Rec., p. 8, Finding of Fact IV), hence the decision of the Court of Claims in *Illinois Central Railroad Co.* v. *United States*, 52 Ct. Cl. 53, has no application.

In that case the Court of Claims held that the Secretary of War could not, by departmental regulation, authorize the transportation, upon Government bills of lading, *to the homes of said officers*, of the authorized mounts of said officers, *when said officers were ordered abroad*—something which it held was not provided for by Congress; and this being so it held there was no authority to require the Government to pay for *such* transportation.

The judgment of the Court of Claims should therefore be reversed, and the case remanded with instructions to enter judgment for the appellant.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Appellant.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad and Navigation Company, Appellant, vs. The United States.	On Appeal from the Court of Claims.

STIPULATION.

(Filed November 15, 1920.)

It is hereby stipulated and agreed by the parties hereto, by their respective counsel, that the following and annexed copies of the Motion of the Oregon-Washington Railroad and Navigation Company in the Court of Claims for Amended and Additional Findings of Fact and Brief thereon, filed May 20, 1919, and the Order of the Court of Claims entered June 2, 1919, overruling said Motion, may be taken and considered as a part of the transcript of record in the Court of Claims of this case for the purposes of this appeal.

William R. Hare,
Attorney for Oregon-Washington R. R. & Nav. Co.

Wm. L. Frierson,
Solicitor General.

Frank Davis, Jr.,
Asst. Atty. General.

COURT OF CLAIMS.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, vs. THE UNITED STATES.	No. 33183.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the annexed (paged from 1 to 12 inc.) are true copies (1) of the claimant's motion for amended and additional findings of fact, and brief thereon, filed May 20, 1919; and (2) of the order of the court, entered June 2, 1919, overruling said motion as the same remain and appear upon the files and of record in this court in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Thirteenth day of October A. D., 1920.

[Seal.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

COURT OF CLAIMS OF THE UNITED STATES.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, CLAIMANT, vs. UNITED STATES.	No. 33182.

MOTION FOR AMENDED AND ADDITIONAL FINDINGS OF FACT, AND BRIEF THEREON.

Now comes the claimant, by its attorneys, and prays the Court to amend its Findings of Fact herein announced May 5, 1919, in the following particulars:

Proposed Amendment to Finding of Fact VI.

Claimant respectfully asks the court to amend the last paragraph of Finding of Fact VI so as to make said paragraph read as follows (new matter italic):

> For the transportation here involved and for like transportation theretofore, claims for which were stated in the same way, the plaintiff company and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books the net amounts determined as above stated and claimed in its vouchers and no more, and upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded by the auditing department of the company as closed, *so far as they were concerned, but as subject to subsequent adjustment or suit in court if subsequently found to be incorrect.*

Proposed Additional Finding of Fact X.

Claimant respectfully requests the following additional Finding of Fact:

The testimony shows that the accounts between the railroads and the Government for Government transportation are considered, by both the Government and the carriers, as in the nature of running accounts, subject to correction as the occasion arises, in the light of the law and the facts. This practice appears to have grown out of the practice by which the railroads transported persons and property for the Government, without prepayment of the charges therefor, upon the form of Government bill of lading prescribed by the Treasury Department, and upon the conditions likewise prescribed by the Treasury Department and set forth therein. The obligation of the Government to pay said charges being fixed by law or the contract for the transportation (in case of freight, the bill of lading) or both, it was understood by the carriers as well as by the accounting officers of the Government that no settlement was final if not in accordance with the law and the contract, as well as the facts, so that if an overpayment were made it could be corrected at any time by the accounting officers of the Government and deducted from a subsequent settlement with the carrier. If an under-payment were made in a settlement by an Auditor of the Treasury Department, the carrier would have its remedy before the Department, subject to certain conditions prescribed in the Dockery Act of July 31, 1894, and failing in securing his remedy there, it might bring suit in the Court of Claims within the time limited by law, or it might sue in the Court of Claims without first applying to the Department. In the matter of any underpayment made by a disbursing officer of the Government, the carrier might either present a claim to the proper Auditor of the Treasury Department, or sue in the Court of Claims.

Chas. H. Bates, Q. 51-59, 63, Evidence, pp. 42-45, 55-60.

Auditors for Claimant Companies, Evidence, pp. 22, 23, 27, 65-66, 72, 74-75, 81, 83, 92, 107.

Proposed Additional Finding of Fact XI.

Claimant respectfully requests the following additional finding of fact:

At the trial of this case in support of the testimony of the Auditors for the several companies embraced in the Union Pacific System and the Southern Pacific Lines, and the testimony of the legal representative of said companies at Washington, D. C., to the effect, as stated in the preceding finding, that the accounts between the Government and the railroads, including claimant were in the nature of running accounts, subject to correction, as the occasion arose, at a later date, under the rules prescribed by law, claimant offered in evidence copies of the following documents showing corrections made by the Treasury Department in prior settlements with certain railroads which settlements had been accepted by said railroads. **(Evidence, pp. 56-60.)**

(Copy.)

NOTICE OF ALLOWANCE OF CLAIM.

Claim No. 170490.

Treasury Department,
Office of the Auditor for the War Department,
Washington, D. C., May 18, 1914.

CHAS. H. BATES, *Atty.*,
Washington, D. C.

The claim of the Galveston, Harrisburg and San Antonio Ry. Co. for freight service in October, 1913, bill No. Q 894, received in this office May 11, 1914, has been allowed, as shown in the following statement, and settlement certificate, No. 21176, dated May 18, 1914, has this day been forwarded to the Secretary of the Treasury for payment.

Amount claimed	$1,863.61
Deducted per statement herewith	1,859.88
As settled	3.73

Respectfully,

J. L. BAITY,
Auditor.

(Copy.)

STATEMENT OF DIFFERENCES.

Arising in the claim of the Galveston, Harrisburg & San Antonio Railway Company for freight service in October, 1913. Bill No. Q-894; claim 170490.

Claimed	$1,863.61
Deducted	1,859.88
Allowed	3.75

Freight charges on B/L 604 is allowed as claimed.

The deduction is on account of overpayment by Capt. E. W. Tanner on his voucher 343-B, July 1913, F. Y. 1913, as follows: B/L 92, Feb. 25, 1913, Ft. Sheridan, Ill., to Texas City, Texas, for nine (9) carloads horses, ten carloads wagons, and one carload feed, on which payment was made on basis of gross rates without deduction account of land-grant equalization, in the sum of $4,395.68. On basis of equalization via Chicago and Cairo payment should not have exceeded $2,535.80.

This movement was by mixed train, hence was not a passenger train any more than it was a freight train. The large number of passengers (requiring 5 baggage and 8 sleeping cars) and large quantity of freight (including 20 carloads horses, wagons, and feed on B/L. #92), moving from one point to a single destination—too great to permit all being handled in a regular train. It would therefore appear that movement in a separate train was as much for the convenience of the carriers as for the Government. See decision of the Comptroller of the Treasury, August 21, 1913 (Appeal 22433), Jany. 15, 1914, Appeal 23092 and Jany. 14, 1914 (Appeal 23005).

Disallowed, $1,859.88.

Treasury Department, Office of Auditor for the War Department, May 18, 1914. 21176.

(Copy.)

NOTICE OF ALLOWANCE OF CLAIM.

Claim No. 156590.
File No. ——.

Treasury Department,
Office of the Auditor for the War Department,
Washington, D. C., May 5, 1908.

To CHARLES H. BATES, *Atty.*,
Washington, D. C.

The claim of the Southern Pacific Co. for passenger service in August, 1907, bill P 3897 received in this office April 6, 1908, has been allowed as shown in the following statement, and settlement certificate No. —— has this day been forwarded to the Secretary of the Treasury for payment.

Amount claimed	$4,819.00
As settled:	
Ctf. #4319—Cash	$1,294.05
Ctf. #4320—B. A.	223.12
Disallowed as per statement herewith	3,301.83
	4,819.00

Respectfully,

B. F. HARPER, *Auditor.*

(Copy.)

STATEMENT OF DIFFERENCES.

Southern Pacific Co.'s bill No. P 3897.

Amount claimed	4,819.00
Amount allowed	4,819.00
Cash, $4,595.88; B. A., $223.12.	
From the cash amount	4,595.88
Deduct	3,301.83
Leaving amount payable	1,294.05

The deduction of $3,301.83 is due to overpayment December 5, 1905, per Sett. No. 30800, Southern Pacific Company's bill No. P 115, on the following transportation requests:

Date	No.	From—	To—	No men.	Rate.	Total amount.
July 6, 1904	490498	Ashland....	Portland....	54	$10.30	$556.20
" " "	490499	Roseburg...	"	51	6.00	306.00
" 7 "	490486	Salem.....	"	58	1.65	95.70
" " "	490491	Eugene.....	"	1	.....	3.75
" " "	490495	Albany.....	"	1	.....	2.45
" " "	490497	Eugene.....	"	99	3.75	371.25
" 8 "	490502	Albany.....	"	55	2.45	134.75
" 18 "	490485	Woodburn..	"	52	.90	46.80
" 19 "	490640	Portland....	Eugene.....	96	3.75	360.00
" " "	490641	"	Ashland.....	51	10.30	525.30
" " "	490642	"	Roseburg....	51	6.00	306.00
" " "	490658	"	Eugene.....	1	3.75	3.75
" 20 "	490687	"	Woodburn...	57	.90	51.30
" " "	490680	"	Albany.....	59	2.45	144.55
" " "	490689	"	Salem.....	58	1.65	96.70
" 27 "	490692	"	Woodburn...	1	.....	.90
" 30 "	50127	"	Eugene.....	1	.....	3.75
" 30 "	50122	"	Albany.....	1	.....	2.45
" " "	50125	"	"	1	.....	2.45
" " "	50129	"	Eugene.....	1	.....	3.75
" 20 "	490484	Albany.....	Portland....	61	.....	149.45
	490694	Portland....	Lebanon....	..	(See below)	135.5
		Total..	.....	..	.....	3,301.83

The above service was furnished by the Southern Pacific Company over its free land-grant road, and no payment should have been made except on Req. No. 490694, 56 tickets, Portland to Lebanon at $2.75, amounts to $154.00, subject to 88.04% free land grant obtained on the following mileage:

(Copy.)

"E. G. 102.

Treasury Department,
Office of the Auditor for the War Department,
Washington, December 14, 1899.

D. A. CHAMBERS, *Atty.*,
Southern Pacific Co.,
908 G Street NW., Washington, D. C.

SIR: You are hereby informed that there has been a charge raised against the Southern Pacific Co., by settlement certificate No. 9184, for the amount of $1,272.25, this charge being on account of payments made to said company by the governor of the State of Oregon for the transportation of volunteers for the United States Army from Ashland and intermediate points to Portland Oregon, in April and May, 1898, said payments having been reimbursed to the governor of Oregon by settlement certificate No. 8631, dated November 2, 1899, under acts of July 8, 1898, and March 3, 1899.

The railroad over which this transportation service was rendered is one which under section 5, act of July 25, 1866 (14 Stat., 239), the property and troops of the United States are to be transported at the cost, charge, and expense of the corporation or company owning or operating the same. A copy of the bill on which this charge is based is enclosed herewith, the transportation being wholly over a free land-grant road, with the exception of the item for transportation for McMinnville to Portland.

The amount of this charge should be deposited with the Treasurer of the United States, to the credit of the appropriation: "Reimbursement to States and Territories for expenses in raising troops for war with Spain."

Respectfully,

F. H. MORRIS,
Auditor.

M. N. M. 12."

(The enclosure is as follows:)

STATE OF OREGON.

"No.....2. G. 9 A.

To Southern Pacific Company (Pacific system).

For transportation of State troops as per transportation requests signed by B. B. Tuttle, Q. M. Gen., O. N. G., attached, at charter car rates:

Received payment.

C. H. MARKHAM,
G. F. & C. A.

No. 147, Roseburg	to	Portland,	43	men	----------	$227.70
148, Salem	"	"	63	"	----------	64.10
149, Eugene	"	"	61	"	----------	143.85
150, Ashland	"	"	39	"	----------	323.95
151, Hubbard	"	"	18	"	----------	36.80
152, Albany	"	"	55	"	----------	92.00
153, Woodburn	"	"	21	"	----------	41.40

(Copy.)

"E. G. 102.

Treasury Department,
Office of the Auditor for the War Department,
Washington, December 14, 1899.

D. A. CHAMBERS, *Atty.,*
Southern Pacific Co.,
908 G Street, NW., Washington, D. C.

SIR: You are hereby informed that there has been a charge raised against the Southern Pacific Co., by settlement certificate No. 9184, for the amount of $1,272.25, this charge being on account of payments made to said company by the governor of the State of Oregon.

(Chas. H. Bates, Q. 51-59: Evidence, pp. 42-45, 55-60; Auditors for claimant companies: Evidence, pp. 22, 23, 27, 65-66, 72, 74-75, 81, 83, 92, 107.)

Proposed Additional Finding of Fact XII.

Claimant respectfully requests the following additional finding of fact:

It does not appear that the Government was put to any disadvantage or loss, so far as the transportation involved herein is concerned, by reason of the acquiescence of the claimant, as aforesaid, in the ruling of the Comptroller of the Treasury that such transportation was entitled to land-grant rates, or by the practice of the claimant in rendering its bills for the transportation involved herein at land-grant rates.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Claimant.

BRIEF IN SUPPORT OF REQUESTS FOR AMENDED AND ADDITIONAL FINDINGS OF FACT.

I.

As to Proposed Additional Findings X and XI and Proposed Amendment of Finding VI.

Proposed Finding X is the same as Finding XIX of Claimant's original Requests for Findings of Fact. The point that the accounts of the railroads with the United States for Government transportation are in the nature of running accounts, subject to correction at a later date in the manner stated in said proposed finding, is not covered at all in the Findings of Fact rendered by the court in this case. The finding requested is fully sustained by the evidence, references to which are given above.

This particular finding is regarded as of vital importance to the claimant's case. The court's attention is directed to the fact that the amended petition is expressly drafted upon the theory that these accounts between the carrier and the Government for Government transportation are in the nature of running accounts, and that the matter involved here is simply one of accounting. Claimant feels that it is entitled to the finding requested, upon the showing made and that this case cannot be satisfactorily determined by the Supreme Court, upon the appeal which claimant intends to take, unless that Court is advised as to the practice referred to in said proposed finding.

In this connection the attention of the Court is also respectfully called to the fact that in Finding VI of this court, p. 9 of Finding of Fact, the court has found that—

> "Upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded as (quoting the language of the company's auditor), 'behind us.' "

This expression is also quoted in the court's opinion in this case.

We do not think it fair to the claimant to leave the findings in this state. While the Auditor for the Company testified as quoted by the court, he also testified as follows (Evidence, p. 27):

> 22. Question. The work that is done under your direction and jurisdiction in connection with these matters, is that accounting in its character, and exclusively accounting?
>
> Answer. Oh, entirely so.
>
> 23. Question. Can you state whether in rendering these accounts against the Government you treat the transactions as closed, or are they subject to subsequent adjustment?
>
> Answer. Well, they are subject to subsequent adjustment. They are being reopened and readjusted right straight along. They always have been. If the Government was dissatisfied with the settlement that it had made, why, it would reopen it and take the money out of some subsequent payment. There wasn't anything particularly final about it.

The testimony of the auditors for the other claimant companies embraced in the Volume of Evidence in this case is to the same effect as that just quoted.

(Evidence, pp. 65-66, 72, 74-75, 81, 83, 92, 107.)

On this point, Mr. Skinner, Traffic Manager of the claimant company, testified (Evidence, pp. 22):

> 14. Question. And in those days did you treat these transactions as subject to adjustment?
>
> Answer. Well, yes; they were continually the subject of adjustment and of controversy. But notwithstanding that, we made our statements from month to month to make our current statements, but they were always subject to adjustment, and as I say, even sometimes came back—I don't think I am exaggerating at all when I say the accounts came back as long as 2 years after their preparation for the correction of 1 cent.

Mr. Bates also testified to the same effect (Evidence, pp. 42-45), and in that connection offered in evidence the several settlements by the Auditor for the War Department now asked to be included in additional Finding XI.

The testimony of the auditor for the company also shows that he did not intend to be understood, when saying that he regarded a transaction of the character referred to therein as "behind us" (i. e., the auditing department) that thereby the company was precluded from questioning the same in the courts, as Finding VI of this court suggests. On this point the auditor for the company said (Evidence, pp. 27-28):

> 24. Question. Did you ever attempt, Mr. Blaisdell, yourself, to determine the legal rights of the Oregon-Washington Railroad & Navigation Co. in connection with settlements of these accounts?
>
> Answer. No; no.
>
> 25. Question. Did you understand, at any time, that you had resolved the matter to a situation where the legal rights of the company had been definitely determined?
>
> Answer. No; I could not do that.
>
> 26. Question. Who would do that, if that were undertaken or done?
>
> Answer. Well, the legal branch of the service would, either our people here or our attorneys in Washington. At the present time Mr. Bates is our representative there. Earlier it was Mr. Chambers. Most of the hard problems were put up to Washington. The little ones, I think, were decided here. But as a rule most of the questions went to Washington, because we did realize that uniformity in these decisions was much to be desired and we didn't want to start out and do something differently from what the other railroads of the United States were doing.
>
> 27. Question. At any time while these accounts were handled under your jurisdiction, did you treat the transactions as closed and ultimately disposed of?
>
> Answer. I don't know that I thought very much about that feature of it, Mr. Hallock. We got the amount of money that the Government was willing to pay us and we took that and entered it on the books and called the

transaction behind us, just accepting more or less under mental protest the settlement.

28. Question. Do you know whether, during those times, you had recourse to any tribunals or authorities for a final adjustment of any disputed accounts?

Answer. Do you mean, did I actually have the recourse or the right of recourse?

29. Question. What I am attempting to determine, Mr. Blaisdell, is this: At any time did you understand that your rights were determined absolutely by the rendition of these bills, or did you understand that you had any further recourse in the event that there was any dispute or misunderstanding as to the correct amounts?

Answer. Oh, I always understood I had further recourse. I was simply getting the money that the Government was willing to pay.

30. Question. And in making these settlements and adjustments did you intend, at any time, to waive any rights or remedies that you might have, or that the carrier might have in the matter?

Answer. No; I would not do that. I didn't give much consideration to that feature of it, but on the broad general ground I would never do a thing of that kind.

We submit, therefore, that Finding VI is very misleading and should be made as above requested, also that additional Findings X and XI should be made as above requested.

II.

Proposed Finding XII.

This proposed Finding is to the effect that the Government was not prejudiced by the acquiescence of the claimant company in the holding of the Comptroller that transportation of this character was entitled to land-grant rates, or in the practice of the claimant company in rendering its bills, for the transportation involved in this suit, at net land-grant rates.

We regard a finding of this fact also as of vital importance. There is no claim of prejudice in this case by the Government

and no loss or material disadvantage to the Government has been attempted to be shown. And we believe the practice of the Government since the decision of this court in the case of the Chicago, Milwaukee & St. Paul Railway Company shows that it was not prejudiced by the acquiescence of claimant in said land-grant deductions, as we understand that the Government has been paying full rates for shipments of this character it has been routing these shipments just the same as it did before, and has treated the matter, since that decision, simply as one of accounting.

On this point Mr. Bates testified (Evidence, pp. 46-47):

> 62. Question. Was the Government put to any disadvantage or loss by reason of the claimants in this and the other cases above referred to failing to assert their claims to full commercial rates for the transportation of household goods and other personal property of Army officers and other Government officials, referred to, in the several petitions therein, at an earlier date?
>
> Answer. No; because all shipments were made on the same form of bill of lading, constituting the contract of carriage. The tariffs of all the railroads, where the roads were in competition with each other, named the same rates of carriage, and either of the competing roads might have been used, but the contract would have been the same, owing to the land-grant equalizing agreements. Thus the through tariff rates from Chicago to San Francisco were the same both via the Union Pacific route via Ogden and the Santa Fe route via Albuquerque, and the equalization agreements of the Union Pacific route would require that they shall accept the same net rates as could be lawfully established via the Atchison, Topeka & Santa Fe system after proper land-grant deductions were made. Therefore, the cost to the Government would be the same no matter which route was used—a land-grant route or a nonland-grant route, a longer or a shorter land-grant route. Nor could the Government be at any disadvantage, of course, where only one route was available.

In opposing substantially the same request in Finding XX of our original Requests for Findings of Fact, counsel for

the Government failed to point out any way in which the Government might have been prejudiced by the practice referred to.

In this connection it should be noted that, instead of being prejudiced, the Government, on the contrary, has *profited* by the acquiescence of claimant and other carriers in the rulings of the Comptroller, to the extent that the additional amounts that might have been claimed for said transportation have been barred by the statute of limitations.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Claimant.

May 20, 1919.

Filed May 20, 1919,
Court of Claims.

In this case it is ordered that claimant's motion for amended and additional findings be overruled.

BY THE COURT.

June 2, 1919.

ILE COPY

Supreme Court, U.
FILED
JAN 13 1921
JAMES D. MAHER,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*,
vs.
THE UNITED STATES.
} Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for the Oregon-Washington Railroad & Navigation Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*,
vs.
THE UNITED STATES.
} Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

Counsel for the Government has seen fit on this appeal to question the correctness of the Court of Claims decision in the case of the *Chicago, Milwaukee & St. Paul Railway Company*, decided February 8, 1915, holding that the transportation of household goods and other personal property of Army officers and other Government officials changing station was not subject to land-grant deductions, although no question was made below by the Department of Justice as to the correctness of that decision, and although that decision has uniformly been followed by the Court of Claims, as well as by the accounting officers of the Treasury since the Act of Congress of August 29, 1916 (39 Stat. 619, 634), providing that the restrictive provisions of the Army Appropriation Acts should *not* be construed (as they had been construed by the

Comptroller of the Treasury after the *Chicago, Milwaukee & St. Paul* case was decided by the Court of Claims) "to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

The acquiescence of all branches of the Government in the decision of the Court of Claims in the *Chicago, Milwaukee & St. Paul* case, was doubtless due to the fact that the uniform construction placed upon the railroad land-grant and Army Appropriation Acts has been that said Acts (construed together, as they must be) only required reduced rates to be given for the transportation of "property of the United States."

It will be observed that all the earlier and by far the more numerous class of railroad land-grant Acts provided that—

> "Said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any *property or troops of the United States.*"

Act March 3, 1863 (12 Stat. 772), Atchison, Topeka & Santa Fe Railroad. (From Atchison, Kans., to State Line.)

Act March 3, 1863 (12 Stat. 772), Atchison, Topeka & Santa Fe Railroad. (From Lawrence, Kans., to southern boundary of Kansas.)

Act May 15, 1856 (11 Stat. 9), Chicago, Burlington & Quincy Railroad. (From Burlington, Iowa, to Missouri, Mo.)

Acts March 3, 1867, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Chicago, Milwaukee & St. Paul Railway. (From St. Paul, via Mendota, to Lyle, Minn.)

Act May 12, 1864 (13 Stat. 72), Chicago, Milwaukee & St. Paul Railway. (From Calmar, Iowa, to Sheldon, Iowa.)

Acts March 3, 1857, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Chicago, Milwaukee & St. Paul Railway. (From Mississippi River (La Crescent) to Houston, Minn.)

Act May 15, 1856 (11 Stat. 9), Chicago & Northwestern Railway. (From Cedar Rapids, Iowa, to Transfer Grounds, Union Pacific Railway, and Branch, Lyons to Clinton, Iowa.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Chicago & Northwestern Railway. (From Winona, Minn., to a point on the Big Sioux River, six-tenths of a mile west of Watertown, Station.)

Act June 3, 1856 (11 Stat. 20), Chicago & Northwestern Railway. (From Fond du Lac, Wis., to Junction with Duluth, South Shore & Atlantic R. R.)

Act May 15, 1856 (11 Stat. 9), Chicago, Rock Island & Pacific Railway. (From Davenport, Iowa, to Transfer Grounds, U. P. R. R.)

Act June 3, 1856 (11 Stat. 20), Chicago, St. Paul, Minneapolis & Omaha Railway. (From 12.3 miles south of Warrens, Wis., to St. Paul, Minn., and Branch from Stillwater Junction, Minn., to Stillwater, Minn.)

Act March 3, 1857 (11 Stat. 195), Chicago, St. Paul, Minneapolis & Omaha Railway. (From St. Paul, Minn., via Le Mars, to Sioux City, Iowa.)

Act June 3, 1856 (11 Stat. 20), Chicago, St. Paul, Minneapolis & Omaha Railway. (From Hudson, Wis., to Superior, Wis., and Branch from Superior Junction, Wis., to Bayfield, Wis.)

Act June 3, 1856 (11 Stat. 21), Duluth, South Shore & Atlantic Railway. (From Marquette, Mich., to Ontonagon, Mich.)

Act June 3, 1856 (11 Stat. 17), East Tenn., Va. & Georgia and Queen & Crescent System. (From Wauhatchie, Tenn., to Meridian, Miss.)

Act August 11, 1856 (11 Stat. 30), East Tenn., Va. & Georgia and Queen & Crescent System. (From Jackson, Miss., to Meridian, Miss.)

Act June 30, 1856 (11 Stat. 18), East Tenn., Va. & Georgia and Queen & Crescent System. (From Delta, La., opposite Vicksburg, Miss., to Shreveport, La.)

Act June 3, 1856 (11 Stat. 17), East Tenn., Va. & Georgia and Queen & Crescent System. (From Selma, Ala., to Jacksonville, Ala.)

Act June 3, 1856 (11 Stat. 21), Flint & Pere Marquette Railroad. (From Flint, Mich., to Ludington, Mich.)

Act May 17, 1856 (11 Stat. 15), Florida Central & Peninsular Railroad Company. (From Fernandina, Fla., to Tampa Bay, and Branch Waldo, Fla., to Cedar Key, Fla.)

Act May 17, 1856 (11 Stat. 15), Florida Central & Peninsular Railroad Company. (From Jacksonville, Fla., to Chattahoochee, on the Apalachicola River, Fla.)

Act June 3, 1856 (11 Stat. 21), Grand Rapids & Indiana Railroad. (From Fort Wayne, Ind., to Petoskey, Mich.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Great Northern Rail-

way Line. (From St. Paul, Minn., to Breckenridge, Minn.)

Acts March 3, 1857, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Great Northern Railway Line. (From St. Paul, Minn., to St. Vincent, Minn.)

Act June 10, 1852 (10 Stat. 8), Hannibal & St. Joseph Railroad. (From Hannibal, Mo., to St. Joseph, Mo.)

Act Sept. 20, 1850 (9 Stat. 466), Illinois Central Railroad. (From Cairo, Ill., to Chicago, Ill.)

Act Sept. 20, 1850 (9 Stat. 466), Illinois Central Railroad. (From Centralia, Ill., to Dunleith (now East Dubuque, Ill.))

Act May 15, 1856 (11 Stat. 9), Illinois Central Railroad. (From Dubuque, Iowa, to Sioux City, Iowa.)

Act June 3, 1856 (11 Stat. 21), Lake Shore & Michigan Southern Railway. (From Jonesville, Mich., to Lansing, Mich.)

Acts June 3, 1856 and May 17, 1856 (11 Stat. 17 and 11 Stat. 15), Louisville & Nashville Railroad. (From Decatur, Ala., to Flomaton, Ala.)

Act May 17, 1856 (11 Stat. 15), Louisville & Nashville Railroad. (From Flomaton, Ala., to Pensacola and River Junction, Fla.)

Act June 10, 1852 (10 Stat. 8), Missouri Pacific Railroad—Main Line. (From St. Louis, Mo., to Pacific, Mo.)

Act June 3, 1856 (11 Stat. 17), Mobile & Girard Railroad. (From Girard, Ala., to Troy, Ala.)

Act Sept. 20, 1850 (9 Stat. 466), Mobile & Ohio Railroad. (From Mobile, Ala., to Cairo, Ill.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Northern Pacific Rail-

Act June 3, 1856 (11 Stat. 20), Chicago, St. Paul, Minneapolis & Omaha Railway. (From Hudson, Wis., to Superior, Wis., and Branch from Superior Junction, Wis., to Bayfield, Wis.)

Act June 3, 1856 (11 Stat. 21), Duluth, South Shore & Atlantic Railway. (From Marquette, Mich., to Ontonagon, Mich.)

Act June 3, 1856 (11 Stat. 17), East Tenn., Va. & Georgia and Queen & Crescent System. (From Wauhatchie, Tenn., to Meridian, Miss.)

Act August 11, 1856 (11 Stat. 30), East Tenn., Va. & Georgia and Queen & Crescent System. (From Jackson, Miss., to Meridian, Miss.)

Act June 30, 1856 (11 Stat. 18), East Tenn., Va. & Georgia and Queen & Crescent System. (From Delta, La., opposite Vicksburg, Miss., to Shreveport, La.)

Act June 3, 1856 (11 Stat. 17), East Tenn., Va. & Georgia and Queen & Crescent System. (From Selma, Ala., to Jacksonville, Ala.)

Act June 3, 1856 (11 Stat. 21), Flint & Pere Marquette Railroad. (From Flint, Mich., to Ludington, Mich.)

Act May 17, 1856 (11 Stat. 15), Florida Central & Peninsular Railroad Company. (From Fernandina, Fla., to Tampa Bay, and Branch Waldo, Fla., to Cedar Key, Fla.)

Act May 17, 1856 (11 Stat. 15), Florida Central & Peninsular Railroad Company. (From Jacksonville, Fla., to Chattahoochee, on the Apalachicola River, Fla.)

Act June 3, 1856 (11 Stat. 21), Grand Rapids & Indiana Railroad. (From Fort Wayne, Ind., to Petoskey, Mich.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Great Northern Rail-

way Line. (From St. Paul, Minn., to Breckenridge, Minn.)

Acts March 3, 1857, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Great Northern Railway Line. (From St. Paul, Minn., to St. Vincent, Minn.)

Act June 10, 1852 (10 Stat. 8), Hannibal & St. Joseph Railroad. (From Hannibal, Mo., to St. Joseph, Mo.)

Act Sept. 20, 1850 (9 Stat. 466), Illinois Central Railroad. (From Cairo, Ill., to Chicago, Ill.)

Act Sept. 20, 1850 (9 Stat. 466), Illinois Central Railroad. (From Centralia, Ill., to Dunleith (now East Dubuque, Ill.))

Act May 15, 1856 (11 Stat. 9), Illinois Central Railroad. (From Dubuque, Iowa, to Sioux City, Iowa.)

Act June 3, 1856 (11 Stat. 21), Lake Shore & Michigan Southern Railway. (From Jonesville, Mich., to Lansing, Mich.)

Acts June 3, 1856 and May 17, 1856 (11 Stat. 17 and 11 Stat. 15), Louisville & Nashville Railroad. (From Decatur, Ala., to Flomaton, Ala.)

Act May 17, 1856 (11 Stat. 15), Louisville & Nashville Railroad. (From Flomaton, Ala., to Pensacola and River Junction, Fla.)

Act June 10, 1852 (10 Stat. 8), Missouri Pacific Railroad—Main Line. (From St. Louis, Mo., to Pacific, Mo.)

Act June 3, 1856 (11 Stat. 17), Mobile & Girard Railroad. (From Girard, Ala., to Troy, Ala.)

Act Sept. 20, 1850 (9 Stat. 466), Mobile & Ohio Railroad. (From Mobile, Ala., to Cairo, Ill.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Northern Pacific Rail-

road. (From Watab, Minn., to Brainerd, Minn.)

Act June 3, 1856 (11 Stat. 18), Southern Pacific Company, formerly Morgan's Louisiana & Texas Railroad. (From New Orleans, La., to Morgan City, La.)

Act June 10, 1852 (10 Stat. 8), St. Louis & San Francisco Railway. (From Pacific, Mo., to Seneca, Mo.)

Acts March 3, 1857, May 15, 1864, and March 3, 1865 (11 Stat. 195, 13 Stat. 64 and 13 Stat. 526), St. Paul & Duluth Railroad. (From St. Paul, Minn., to Duluth, Minn., and from White Bear Lake, Minn., to Stillwater, Minn.)

Act June 3, 1856 (11 Stat. 18), Texas & Pacific Railway. (From Shreveport, La., to Texas State Line, near Waskom, Texas.)

Act May 5, 1864 (13 Stat. 66), Wisconsin Central Railway. (From Portage City, Wis., to Ashland, Wis.)

The absolutely "free" land-grant Acts also used similar language, *i. e.*, they require free transportation only of "property and troops of the United States."

Act July 25, 1866, sec. 5, 14 Stat. 239, Southern Pacific Co. (From junction with Central Pacific Railroad to northern boundary of California.)

Act July 28, 1866, sec. 1, 14 Stat. 338, Little Rock & Fort Smith Railway, Little Rock & Memphis Railway, and Missouri Pacific Railway.

As to the first class of land-grant railroads, it is clear that the Government has no right to require the transportation of private property of Army officers and other Government officials at land-grant rates.

Nor are we, in this case, considering the transportation of troops, but the transportation of the household goods and other private property of Army officers, and other Government officials, on permanent change of station, under regulations of the War Department or other Government officers, which authorize the transportation of from 6,000 pounds (3 tons) for a captain to 15,000 pounds (7½ tons) for a general. Clearly this is not transportation of "property . . . of the United States."

The other and very limited class of "fifty per cent" railroad land-grant Acts, such as that quoted in the Brief for the Government in the *Western Pacific* case (No. 136, now pending here), provide that the railroad—

> "shall be a post route and a military road, subject to the use of the United States for postal, military, naval and other Government service, and also subject to such regulations as Congress may impose restricting the charges for such *Government* transportation."

The only Acts of this last-mentioned class were:

> Act of July 2, 1864, 13 Stat. 365, relating to Northern Pacific Railroad, and Act of July 27, 1866, 14 Stat. 292, relating to Atlantic and Pacific Railroad and Southern Pacific Railroad in Southern part of California.

See Circular No. 16, Quartermaster General's Office, 1912, entitled "Schedule of Land-Grant and Bond-Aided Railroads of United States", cited in footnote to opinion of this court in *Union Pacific R. R. Co.* v. *United States*, 249 U. S. 354. Mr. Justice Brandeis,

in delivering the opinion of the court in that case, after referring to this circular and the Act of September 20, 1850, 9 Stat. 466, 467 (one of the numerous Acts using the expression "property or troops of the United States"), says that "A few of the Acts granting lands in aid of railroads provided that the grant is 'subject to such regulations as Congress may impose restricting the charges for . . . Government transportation.' "

In pursuance of the authority reserved in said last-mentioned class of Acts, Congress, beginning with the Army Appropriation Act of February 24, 1891 (26 Stat. 775-776), provided that railroads of said class "having claims against the United States for the transportation of troops and munitions of war and military supplies and property, should be paid not exceeding sixty per centum of the rates paid by private parties" for such Government transportation.

In the same paragraph of said Act, Congress had previously provided that the first class of railroads should receive in payment for "Army transportation lawfully due" such railroads (to be adjusted in accordance with the decisions of this court in certain land-grant cases) not to exceed fifty per centum of the full amount of the services paid.

The uniform construction put by the several Departments of the Government upon these and similar provisions in the Annual Army Appropriation Acts has been that they both referred only to the transportation of "property of the United States", no distinction ever having been made or attempted to be made between said two classes of land-grant Acts in this respect.

(It will be noted that the difference in the amount of deduction required by the Act of 1891 for the two

classes of land-grant roads was immediately eliminated in the next succeeding Army Appropriation Act, indicating that this discrimination was probably due to an inadvertence.)

The only question that has been made in the application of both of said groups of Acts to Government transportation is as to whether the aforesaid restrictions in the Army Appropriation Acts as to the second class of land-grant roads were not intended to be limited to transportation of property of the United States *for the Army*, but the Comptroller of the Treasury took the view that transportation of *property of the United States* for any other Department was included, a question which the Comptroller admitted, however, was not free from doubt. (It will be observed that the provisions of said Acts as to the first class of land-grant railroads only applied, in terms, to "Army transportation" over said roads.)

The attitude of the Comptroller of the Treasury in regard to the restrictions imposed by Congress upon the second class of land-grant roads appears in his decisions of June 24, 1897, 3 Comp. Dec. 724, and January 17, 1917, 23 Comp. Dec. 395. In the headnote to the former case it is stated (3 Comp. Dec. 724, italics ours):

> "The grant of land to the Northern Pacific Railroad Company having been made subject to such regulations as Congress may impose restricting the charges for Government transportation, and the only regulation heretofore made being with reference to persons in the military service *and to property of the United States*, said company is entitled to the regular tariff charges for the transportation of civilian employees of the Government in the Indian service."

In the second decision above cited the Comptroller, after referring to the provisions of the Northern Pacific land-grant act, said (23 Comp. Dec. 397, italics ours):

> "A restriction as to the basis of payment for Government transportation over roads subject to the aforesaid condition was made in the Army appropriation act of February 24, 1891 (26 Stat. 776), and continued since that time, the basis of payment being fixed at 50 per cent of tariff rates by the act of July 16, 1892 (27 Stat. 180), thus making the same basis of payment as applied to the other land grant roads for which payment for *Government transportation* is made under appropriations by Congress in accordance with the decisions of the Supreme Court.
>
> "In a decision of this office of May 12, 1904 (29 MS. Comp. Dec. 555), the then Comptroller, in construing a similar case, said:
>
> " 'Soon after the passage of the first acts above cited (February 24, 1891, 26 Stat. 776), restricting the charges for Government transportation over the class of roads indicated, the question whether the restriction applied to the charges for the transportation of *Government property* payable from other appropriations than "Transportation of the Army" was duly considered by both the First and Second Comptrollers. The question was admitted to be not free from doubt, but both of said officials held that the restriction was applicable to the transportation of *all Government property* regardless of the appropriation chargeable therewith. See decision of First Comptroller, dated June 1, 1893 (MS. Dec., First Comp. v. 13, p. 296) and decisions of Second Comptroller, March 14, 1893 (MS. Dec., Second Comp., v. 61, p. 184) and October 26, 1893 (id. v. 62, p. 170).

"'Since the rendition of the decisions referred to, it has been the practice of the accounting officers to consider the restrictions referred to as applicable to the transportation of *all Government property*, and the railroads have acquiesced therein. The practice has been affirmed by this office. See decisions of June 24, 1897 (3 Comp. Dec. 724); April 16, 1898 (MS. Dec., vol. 6, p. 640), and April 26, 1898 (id. p. 688).'"

It was because of the aforesaid long-continued and practical construction of these land-grant and Army Appropriation Acts that the Comptroller held that the household goods and other personal property of Army officers, within the regulation change of station allowance, was "*quasi-public property*" (11 Comp. Dec. 174, decision of Oct. 13, 1904). If *private* property shipped by the Government (because of the interest it had therein) was entitled to transportation at reduced rates under said railroad land-grant and Army Appropriation Acts or any of them, then the Comptroller would not have had to hold that private property within the regulation change of station allowance was quasi-public property. So, too, if private property generally of public officials could be shipped by the Government at land-grant rates, private property of Army officers in excess of the regulation change of station allowance would be entitled to such rates, but the Comptroller held otherwise (11 Comp. Dec. 174).

Further evidence of the Government's uniform and long-continued attitude in this respect appears from the form of "Government bill of lading" adopted by the Government and expressly approved by the Comptroller of the Treasury in 1907, a copy of which is contained in the Record (pp. 9-11). It will be observed that said Government bill of lading in terms

applies only to "public property," that term being used several times throughout the bill and the conditions and instructions attached thereto, except in one instance, where the expression is "Government property."

In said Government bill of lading transportation of *property of the United States* for other Departments than the War Department is covered by the following clause (Rec., p. 11):

> "7. *Public property* may be delivered by any Government officer or agent to the Quartermaster Department of the Army, which will ship the same under its regulations (23 Stat. 111)."

Remembering that the earlier and much larger class of land-grant Acts applies in express terms only to "property . . . of the United States", and that it would introduce great confusion into the administration of the land-grant laws to differentiate between the two classes, and considering the uniform construction placed by the Government upon said Acts and the provisions of the Army Appropriation Acts enacted in pursuance thereof, it would seem that there is no warrant for holding that anything other than property of the United States was ever contemplated by either class of Acts or the restrictions in the Army Appropriation Acts applicable thereto.

It is further to be observed that the expression in the Army Appropriation Act of 1891 and subsequent Acts of that character (referring to the second class of land-grant railroads) "having claims against the United States for transportation of troops and munitions of war and military supplies and property," itself implies that the property referred to was Government

property. Certainly, at least, said language is susceptible of that construction, and such, as we have seen, has been the construction uniformly given it by the Departments of the Government charged with its administration as well as by the Court of Claims in several cases, including those now before the court.

It does not follow, as Government counsel contend, that the class of transportation here in question would not be authorized by the Army Appropriation Acts if held not to be entitled to land-grant rates. The Army Appropriation Acts provide for "the transportation of the Army and its supplies", including "transportation of troops . . . and of their baggage", and the appropriations for such transportation are not made dependent upon the question whether any class of transportation is or is not subject to land-grant rates. Even transportation of baggage in excess of the regulation change of station allowance has been expressly authorized since the Act of March 27, 1910 (36 Stat. 243, 255), which provided:

> "TRANSPORTATION OF THE ARMY AND ITS SUPPLIES: For transportation of the army and its supplies, including transportation of the troops when moving either by land or water, and of their baggage, including the cost of packing and crating: *Provided*, That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess; . . ."

So, also the Army Appropriation Acts cover the transportation of many persons more or less directly connected with the Army, who are not embraced in the term "troops of the United States", as used in the

railroad land-grant Acts (*Union Pacific R. R. Co.* v. *United States*, 249 U. S. 354).

If any distinction is to be made between the two classes of "fifty per cent" land-grant roads, as to the transportation of property for the Government, then this case must be remanded to the Court of Claims for further findings, as it does not appear from this record which class of land-grant roads was involved.

The other points made by counsel for the Government appear to be sufficiently answered by our main brief.

Respectfully submitted,

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January, 1921.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE OREGON-WASHINGTON RAILROAD & Navigation Company, appellant, *v.* THE UNITED STATES. } No. 134.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was instituted in the Court of Claims to recover from the Government amounts in excess of those already paid to claimant as freight charges for transporting property of officers of the United States Army upon changing station.

Before any of the shipments involved in this case were made, many of the railroad companies of the United States, including claimant, entered into agreements with the United States to accept for transportation at land-grant rates property moved by the Quartermaster Corps, United States Army, for which the United States is lawfully entitled to reduced rates over land-grant roads. (Finding II, R. 7.)

Claimant was not a land-grant road but was a party to this agreement. The Army regulations provided for shipment by the quartermaster at Government expense of certain weights of baggage for each officer upon change of station. (Finding IV, R. 8.) The allowance was graduated according to the rank of the officer.

Without any definite ruling upon the subject by the comptroller on any claim directly presenting the question (Finding of Facts, opinion of court, R. 18, 21; and opinion of court in case of *B. & O. R. R. Co.* v. *U. S.*, 52 Ct. Cls. 468, 474, 475), bills were rendered by all of the railroads, including claimant, to the Government for transportation of the authorized baggage allowance of officers at land-grant rates and not at the regular commercial rates. The bills as so rendered were paid by the Government and no protest was made or claim for additional amounts advanced by claimant. This continued until February 8, 1915, when the Court of Claims in an unreported case (50 Ct. Clms., 412) gave the Chicago, Milwaukee & St. Paul Railway Co. judgment against the Government for the difference between the land-grant rates paid to it for certain transportation of officers' baggage and the regular commercial rates, thus, in effect, holding that officers' baggage transported at Government expense upon change of station did not constitute property of the United States to the transportation of which land-grant rates were applicable. The correctness of this judgment is not conceded by the Government.

The theory of claimant in this case is that the judgment in the *Chicago, Milwaukee & St. Paul case* established that it was entitled to full commercial rates on all the shipments of officers' baggage for which it had only charged and collected land-grant rates, and recovery is asked for such difference on all shipments made over its road during the six years immediately preceding the filing of its petition and prior to February 8, 1915 (the date of the judgment in the *Chicago, Milwaukee & St. Paul Ry. Co. case*). (Finding VIII, R. 17.)

It is stated in the petition (R. pp. 1–6) that settlement of the freight bills presented by it to the Government was a mere matter of accounting, subject to correction at any time; and, quoting from the petition (R. 4, 5):

> Prior to the commencement of this suit and for the period covered by the transportation embraced herein, claimant's auditors, erroneously and by mistake, rendered its bills or vouchers for the transportation of household goods and other personal property of Army officers and other Government officials changing stations, shipped through the Quartermaster's Department of the Army upon Government bills of lading, upon the basis of the tariff rates with deductions on account of land-grant distance involved, and claimant's auditors so rendered its bills and vouchers for the transportation of that character embraced in this suit, although said deductions were not authorized or required by law or the bills of

lading upon which the shipments referred to were made, and payment for said transportation was made by the United States only on that basis.

It is further alleged in the petition that the company's auditors "were led and constrained" so to present its bills because the shipments were made by the Quartermaster Department of the Army upon Government bills of lading which are in terms only applicable to "Government property" and "public property," and because the comptroller had held that such shipments were entitled to land-grant rates. No protest, appeal to the comptroller, or to court is alleged; but it is claimed that its presentation and collection of its bills was not intended by it as a waiver, and that it at all times intended to maintain its right to sue, if so advised, for the balance on account of land-grant deductions.

BRIEF OF ARGUMENT.

The Government doubts the correctness of the judgment of the Court of Claims in the case of the *Chicago, Milwaukee & St. Paul case* (50 C. Cls. 412). If that judgment is erroneous, there is no foundation for the claim now advanced.

That case is therefore made the first proposition in our brief, because it logically comes first, not because of its importance in this case. If that judgment was incorrect, claimant, of course, is concluded; if correct, claimant is nevertheless barred. The argument on behalf of the Government is:

I. *Shipments of the "regulation change of station allowances" of Army officers' baggage were properly entitled to land-grant rates.*

II. *The Appropriation Acts providing the funds out of which claimant's bills were paid provided that such payments "shall be accepted as in full for all demands for such service."*

III. *The presentation of its bills, without reservation or protest, in the exact amounts for which they were approved and paid by the Government, estops claimant from now asserting that such bills were not for the full amount due.*

IV. *If claimant's failure to present bills for the amounts to which it now claims it was entitled was due to mistake, the mistake was of law.*

V. *If there was no mistake, claimant is concluded by its contracts.*

VI. *The request for additional findings of fact is improperly before the court; it is also without merit.*

ARGUMENT.

I.

Shipments of the "regulation change of station allowance" of Army officers' baggage were properly entitled to land-grant rates.

This question is really the primary one in the case; claimant's brief is written upon the assumption that the correctness of the holding of the Court of Claims in the case of the *Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, 50 Ct. Cls. 412, is conceded by the Government because no appeal was

taken. Its correctness is not conceded and, as the question has never been passed upon by this court, it is still open. The case is unreported; there was no opinion. An examination of the record shows a very meager and, as we view it, wholly insufficient finding of facts. The findings and conclusions of law, omitting the first formal finding, are as follows:

II.

Some years ago, and before the transactions hereinafter mentioned, the railroad companies of the United States generally, including claimant, severally agreed with the Quartermaster General of the United States Army that they would each accept, for the transportation of Government troops and property, the amounts that would be payable by the Government, calculated by way of the cheapest route between the same terminal points. These agreements, known as "Equalization" agreements, are still generally in effect. The amounts due in settlement have been arrived at by taking the amounts due for the transportation at commercial rates by way of the practicable route between the terminal points of the movement affording the largest proportion of "land-grant" mileage and deducting from such amount fifty per cent of such part of the amounts as would accrue to said land-aided portion.

III.

Under the regulations of the United States Army in force at the times hereinafter stated each and every officer of the Army, when

changing station, was entitled to the transportation, at the expense of the Government, of a certain weight of household goods or other personal property belonging to him, the weight being graded by his rank.

IV.

In making payment to claimant for the transportation of the effects of certain officers since November 27, 1908, the accounting officers of the Treasury made deduction, from the amounts due for said transportation at ordinary commercial rates, on account of land grants, and paid to claimant only the same rates as were due to be paid for the transportation of property of the United States.

By reason of said deductions as shown in the appendix to the original petition filed herein, claimant has been paid four thousand four hundred and three dollars and eighty cents ($4,403.80) less than it would have received had it been paid for said transportation at the ordinary commercial rates.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to judgment of and from the United States in the sum of four thousand four hundred and three dollars and eighty cents ($4,403.80).

This case, such as it is, is the only ruling upon the question of the application of land-grant rates to shipments of this character.

The Court of Claims in the *Baltimore & Ohio case* (52 Ct. Cls. 468, 489) states:

> The conclusion we have reached is different from that in the *Chicago, Milwaukee & St. Paul Ry. Co.*, No. 32975, in which claimant had judgment. None of the questions herein were suggested by the defendants in that case. The Government's brief stated:
>
> "There is but one question involved in this case, and that is whether or not the railroads should carry the effects of officers when transferring stations at land-grant rates."
>
> As was suggested in *Wilson's case*, 38 Ct. Cls. 6, 10, the fact that a judgment has been rendered in another case does not present a sufficient reason for an entry of judgment in this case.

In the opinion in the present case the court says (R. 19):

> The question as to the applicability of land-grant rates to this class of transportation may be regarded as settled adversely by the *Chicago, Milwaukee & St. Paul Ry. Co. case*, decided by this court February 8, 1915.

The court then calls attention to the findings above quoted, showing that deductions had been made in the bills of the railroads by the accounting officers *of the Government*.

In neither the *Baltimore & Ohio case*, nor the present case, does the court find, except on the authority of the *Chicago, Milwaukee & St. Paul case*, that these shipments were not entitled to land-grant

rates. Therefore, as in that case, no reason for the holding is stated or indicated, it becomes important to ascertain whether or not there is any basis for the judgment rendered. It is submitted that the only possible reason could be that the words "of any property" in the land-grant acts mean property of which the United States is the absolute owner, and that therefore as the Government did not actually own the property of officers considered by it necessary to be transported at public expense, land-grant rates were not applicable. That is, that the words "any property" must be given the narrowest meaning, the same as the word "troops" as determined in *United States* v. *Union Pacific Railroad Company*, 249 U. S. 354. But in that case it is expressly stated (p. 356):

> In defining the transportation rights secured to the United States, these land-grant acts draw a broad distinction between freight and passengers. All "property" of the Government, whatever its character and intended use, is to be carried "free from toll or other charge," but of the many persons in the service, only "troops." The history of the legislation shows that both the broad term "any property," and the narrower one "troops," was adopted deliberately.

A distinction between the two cases is at once apparent. The persons whose status was passed upon in the *Union Pacific case* were in no sense "troops of the United States." The officers, the status of whose property is involved in the present case, were

officers of the regular United States Army, traveling under compulsory orders for the good of the public service, and the property shipped was the property determined by competent authority, military regulations, to be necessary "for their use in the discharge of their official duties" (Finding IV, R. 8). The term "baggage" includes all necessary property of an officer, including household goods. The amount necessary is determined; if an officer desires to transport more than is necessary, he can do so at his own expense. That the transportation of an officer changing station under orders is essential to the service of the public must be admitted; is it not equally essential that a certain amount of his property, which, as found by the Court of Claims is necessary in the performance of his public duties, be also transported? What amount is necessary is primarily to be determined by Army regulation, subject, of course, to review by court if an arbitrary or unreasonable regulation is made. Provision is made in the Army Appropriation Acts for the hire, by the Government, of draft and pack animals, harness, wagons, etc., for military purposes; when such property, which is clearly not the property of the Government in the absolute sense, is shipped over a land-grant road, are not land-grant rates applicable? If not, there is no provision of law for paying for such transportation, for, unless included as Government property under the land-grant acts and Army appropriation bills, there is no authority for the payment of transportation of such property, which belongs to private indi-

viduals. The property of an officer is just as much devoted to the public use as any military property owned absolutely by the Government. The Government has absolute control over an officer so that it can send him where and when it pleases, leaving him no option in the matter; does it not also control and use in the fullest sense the personal property which must necessarily go with him? Some officers own their own mounts, others do not; the benefit to the Government is really greatest in the case of private ownership. The mount is, of course, necessary to the performance of the officers' duties. May the Government ship the mount of one officer and not that of the other?

We have called attention to the appropriation acts under heading II of this brief. These acts all certainly fully authorize the transportation of officers' regulation allowance of baggage, unless such provision is repugnant to and controlled by the land-grant acts. We submit that there is no repugnancy, but that the term "any property" as used in the land-grant acts is entitled to at least a reasonable construction which makes that act consistent with the appropriation acts, and the construction adopted and followed for years both by the railroads and the Government.

It is further submitted that claimant in this case, not being a land-grant road, by its method of treating these shipments, has shown clearly that the intent of both parties to the equalization agreements (R. 7, Finding II) was that such shipments were entitled to

land-grant rates; by entering into that agreement it covenanted that it would—

> accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, etc.

At that time it knew that included in the "property moved by the Quartermaster Corps" was the regulation baggage allowance of officers, for the transportation of which the Government paid land-grant rates.

The property was moved by the Quartermaster Corps and was for all practical purposes the property of the United States, property over which the United States had dominion and control and which was devoted to its use. It is submitted that in view of the appropriation acts, the Army Regulations, the long-continued construction by all parties interested, and the facts, a holding that this property does not come within the provisions of the land-grant acts and equalization agreements, because it is not owned absolutely by the United States, is not only contrary to all rules of statutory construction but is contrary to ordinary common sense. Such holding would result in stamping all payments heretofore made to claimant as well as other railroads for like shipments as unauthorized and unlawful, for there is no provision in any of the appropriation acts for shipping private property; and under this construction no

shipments could be paid for out of the appropriations except shipments of property belonging absolutely to the Government.

II.

The Appropriation Acts, providing funds out of which claimant's bills were paid, provided that such payments when made should be in full for the services rendered.

Reference is made to the opinions of this court in *Lake Superior & Mississippi Railroad Company* v. *United States*, 93 U. S. 442, *United States* v. *Union Pacific Railroad Company*, 249 U. S. 354, and to the opinion of the Court of Claims in the *Baltimore & Ohio case*, 52 C. Cls. 468, and the present case (R. pp. 18–29) for the history of the land-grant acts and the appropriations out of which the bills for transportation over land-grant railroads have been and are payable.

After the decision in *Railroad Company* v. *United States*, 93 U. S., 442, above referred to (payment for transportation over land-grant roads having been prohibited for some time prior thereto), Congress provided in the Appropriation Act of June 30, 1882 (Ch. 254; 22 Stat. 117, 120), "for the payment for Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts;" the payment was limited to not to exceed fifty per

cent of commercial rates and it was provided "such compensation * * * shall be accepted as in full for all demands for said services." The same provision was repeated in the Deficiency Act of August 5, 1882 (Ch. 390; 22 Stat. 257, 261–262).

The Army Appropriation Act of February 24, 1891 (Ch. 284, 26 Stat. 770, 775–776) provided—

> Army transportation: For transportation of the Army, including baggage of the troops when moving either by land or water; * * * for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts), but in no case shall more than fifty per centum of the full amount of the service be paid: *Provided further*, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: *Provided further*, That in expending the money appropriated by this act, a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public land to aid in the construction of its railroad on condition that such railroad should be a post route and military road subject to the use of the United States for postal, military, naval, and all other Government service, and also, subject to such regulations as Congress may impose restricting the charges for such

> Government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroad, shall only be paid out of the moneys appropriated by the foregoing provision on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed sixty per centum of the compensation for such Government transportation as shall at the time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service.

Except for this act, the maximum has always been fifty per cent and the maximum has always been paid.

The provision that the amount so fixed and paid "shall be accepted in full for all demands for such service" has been included in every Appropriation Act since. The acts making appropriations out of which claimant was paid for all services now sued upon, each of which contains said proviso, are Act of March 3, 1909, ch. 252, 35 Stat. 732, 745; Act of March 23, 1910, ch. 115, 36 Stat. 243, 256; Act of March 3, 1911, ch. 209, 36 Stat. 1037, 1050; Act of August 24, 1912, ch. 391, 37 Stat. 569, 582; Act of March 2, 1913, ch. 93, 37 Stat. 704, 715; Act of April 27, 1914, ch. 72, 38 Stat. 351, 364–365.

The Appropriation Act of March 23, 1910 (ch. 115, 36 Stat. 243, 255) added the following proviso:

> *Provided*, That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess.

The Appropriation Act of April 27, 1914 (ch. 72, 38 Stat. 351, 365) added the following proviso:

> *Provided further*, That hereafter private mounts of officers in excess of the authorized mounts may be shipped on Government bill of lading with authorized mounts, and reimbursement collected for transportation charges on such excess mounts.

This was held by the Court of Claims (*Illinois Central Railroad Company* v. *United States*, 52 Ct. Cls. 53) to apply only "to officers who are changing stations."

After the judgment of the Court of Claims in *Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, Feb. 8, 1915, the comptroller still held, rightly, we think, that if payments for transportation of officers' regulation baggage allowance could be made at all, it could only be made in accordance with the only appropriation available, namely, that provided by army appropriation acts, which limited land-grant roads to fifty per cent of commercial rates. (22 Dec. Comp. Treas. 263.)

Thereafter, in the Appropriation Act of August 29, 1916 (ch. 418, 39 Stat. 619, 634), the following provision was incorporated:

> *And provided further*, That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant acts.

These Appropriation Acts are to be read in connection with the appropriate provisions of the land-grant acts, which provided that land-grant railroads shall be "free from toll or other charge upon the transportation of any property or troops of the United States"; the equalization agreements, by which claimant (which is not a land-grant road) is bound by the land-grant provisions, and by which claimant agreed (Finding II, R. p. 7) "to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement"; and the Army Regulations, by which the baggage of an officer to the extent considered necessary in the performance of his duty upon change of station was delivered to the quartermaster for packing and shipment at Government expense, a clear distinction being drawn

between the necessary allowance transported by the Government and the excess over the allowance for which the officer himself paid full rates.

The property in question was clearly classed by the Government as "property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads,"—witness the appropriations made for that purpose year after year, the Army Regulations, the payment of all bills for such transportation out of such appropriations; the opinion of the comptroller in 1904 (XI, Dec. Comp., 174) that the excess over the authorized allowance was not Government transportation, and other opinions since.

It was just as clearly recognized as transportation of such property by the claimant, for its petition in this case alone shows that it presented 176 bills for payment out of these appropriations which were only available to pay for transportation of Government property. It not only presented its bills at land-grant rates, but certified that they were correct, making no claim whatever that other rates were applicable. It received payments out of these appropriations, under law, which provided in terms that such payments "shall be accepted as in full for all demands for such services." Can it now be heard to say that it is not bound by its own acts, performed with full knowledge of the facts and the law, and having been in no way deceived or misled by any officers of the Government?

In claimant's brief it is contended that it is not bound by the provision of law under which it accepted payment because the property transported was private property of the officers, not property of the United States at all, and hence not covered by the law. If this is true, then claimant has been paid the amounts billed to the Government by it without authority of law. It has been a party (innocently, of course) to the payment of private bills out of the public treasury. Upon this theory the Government should recover back from claimant public moneys unlawfully paid to it, leaving claimant to recover from the officers whose property was shipped. Unless this property came under the head of property of the United States, construing the land-grant acts, appropriation laws, Army Regulations, and equalization agreements together, then there is no authority to pay anything for its shipment, and no officer could bind the United States to pay for such shipment. If it does come within the class of such property, and we contend it does, its transportation is entitled to reduced rates.

However, claimant having received payments under a law must be held to have accepted them according to the terms of the law and is bound thereby.

III.

The presentation of its bills, without reservation or protest, in the exact amounts for which they were approved and paid by the Government, estops claimant from now asserting that such bills were not for the full amount due.

The exact contention made in this case was first made in a suit brought by the *Baltimore & Ohio Railroad Company* v. *The United States*, decided June 14, 1917, 52 C. Cls. 468. In that case there is an exhaustive opinion by Judge Downey, former Comptroller of the Treasury, holding that the railroad company having without compulsion and without being misled in any way prepared its bills for shipments made by the Quartermaster Corps of the Army, certified that these bills were correct, received payment for the same and closed the transaction so far as it was concerned, could not, after a determination by a court upon a question of law, reopen its accounts against the Government and put in bills for additional amounts on account of the same service. No appeal was taken by the railroad from the judgment of the Court of Claims in that case. It is apparent that the claimant tries to escape from the holding in the *Baltimore & Ohio case* by alleging that its rendition of bills against the Government for these freight shipments and the payment and receipting of such bills was a matter of continuous accounting between it and the Government under which any and all accounts could be opened and restated at any time within the limitation period. Also (p. 8

claimant's brief) because its auditors and agents were led to believe that the property shipped was Government property and also because the Comptroller of the Treasury had held that such shipments were entitled to land-grant rates and that in presenting its bills and accepting payment at land-grant rates it did not intend to waive its right to sue for an additional amount if so advised.

As to the first contention that the settlement for such freight transportation was regarded by the United States as a matter of accounting the Court of Claims does not so find, but it does find that the accounts were treated as closed by claimant. That each shipment constituted a separate transaction or account and upon rendition of the bill and its payment that account was closed. (Finding VI, R. pp. 12–15.) Were it not for this finding, which is, of course, conclusive, it is submitted that the question in this case is not one of accounting at all but is one of law, and it is difficult to conceive upon what theory it can be claimed that the question as to whether the claimant was entitled to full commercial rates or land-grant rates on these shipments was to be left open subject to future determination by accounting officers when no claim had been presented to either disbursing or accounting officers or to the comptroller by the claimant that it was entitled to full commercial rates; and when, as appears from the record, the Government had never even considered the proposition of paying other than land-grant rates. It is also difficult to conceive why claimant,

if it considered that this matter was a subject of accounting upon which at least fifty per cent more than it had received was justly due, would allow year after year to elapse, thus effectually barring any claim it might have without asking for an accounting, presenting a bill showing its claim, or instituting suit. It is apparent also from the manner in which each shipment was made and paid for that it constituted a closed transaction so far as the Government was concerned and that no disbursing officer of the Government would have power to pay a claim of this character, leaving open for future determination the matter as to whether or not the Government should pay more.

The fact that certain bills rendered by railroads for shipments of Government property upon being audited were corrected on account of mistakes made has no bearing whatever upon this question. Even if claimant had made a mistake in stating its bills for a less amount than it should have stated them, no corrected bills were presented or asked to be presented nor was any restatement of account asked. As to the contention that the bills were rendered as they were because the shipments were made for the Quartermaster's Department of the Army upon Government bills of lading which were applicable only to Government property, if it is contended that by this claimant was led to believe that it was shipping property which actually belonged to the Government and was not shipping officers' change of station allowance for the Government, the contention is at variance with

Finding IX of the Court of Claims (R. 17, 18), with the Army Regulations (Finding IV, R. 8), knowledge of which the claimant must have had, and the decision of the comptroller upon which claimant relies (XI Comp. Dec. 174), where the Illinois Central Railroad Company contended "that the personal effects of an officer of the Army, *over and above his authorized allowance on change of station*, is not in any sense the property of the United States." (Italics appear in the original opinion.) This opinion was rendered October 13, 1904. It shows that the railroads recognized fully just what property they were transporting on the Government's bills of lading. In addition, this opinion shows that the contention that the railroads believed that they were entitled to full commercial rates on shipments of officers' property and reserved their right to advance such claim was not thought of; that, on the contrary, at that time they acquiesced in the view that an officer's authorized allowance of baggage on change of station, the transportation of which was paid for by the Government, was entitled to the land-grant rates, for the claim which was the subject of this decision by the comptroller was only for full rates on the *excess* over such allowance and no question was made as to the land-grant rates on the allowance.

The contention that claimant can escape the effects of presentation and settlement of its accounts because the comptroller had ruled that such transportation was entitled to land-grant rates is unimportant except as it may be claimed that if such ruling

was made it shows that the railroad companies had made this contention and therefore had put the Government upon notice that they claimed the right to recover such balance if at any time it might be decided that they were entitled to it. The question was never presented to the comptroller for his opinion and no such direct ruling was ever made by him. It is conceded that he would have made it had it been presented, and it appears from the record, various opinions of the comptroller, and the conduct of the railroads, including claimant, that it was well understood that the Government regarded these shipments as entitled to land-grant rates and would only pay on that basis. It was not presented by claimant, and, so far as we have been able to ascertain by examination of the comptroller's decision, the question was never presented by any railroad. It seems to have been assumed by all concerned from the beginning of such shipments until the date of the decision in the *Chicago, Milwaukee & St. Paul case* by the Court of Claims that such shipments were entitled to land-grant rates upon the theory, as well expressed in the decision of the comptroller of October 13, 1904, above referred to, that the officers were officers of the United States Army, that the baggage allowance upon change of station was considered necessary for the officer in the discharge of his duties, and that therefore it was proper for the Government to pay for its transportation as public property. It is true the Court of Claims finds that as far back as 1891

that the attorney of the claimant company expressed his opinion to the comptroller that such shipments were not entitled to land-grant rates and that he was informed by the comptroller, with whom he discussed the matter, that if not satisfied with the decisions his redress was in the courts. It does not appear that at the time of these conversations there was any claim pending before the comptroller involving this question; there is no ruling made upon it by the comptroller and it does not appear that the opinion of the attorney was ever communicated to his clients. If it was, then it does appear negatively that such opinion was never acted upon in any way.

The fact that it was useless to present such claim to the comptroller because it was known what his ruling on it would be does not relieve the claimant from the fact of not presenting such claim. Claimant's bills were presented to the disbursing officers, the quartermasters who had no power whatever to make deductions from, additions to, or alterations in bills, but could only pay bills as presented. As pointed out in the opinion of the Court of Claims, the claimant could have presented its bills in any amount that it claimed to the proper auditor, who would have authority to allow or disallow the claim in whole or in part, and from this allowance in whole or in part an appeal could be taken to the comptroller for the revision of the allowance of the auditor. The opinion of the comptroller would, of course, be binding upon the auditor and the disbursing officers, but

it would not be binding upon the claimant if it exercised the right it would still have to sue in the Court of Claims. The way was open at all times to it to present its claim for any rate it deemed applicable and to have the matter definitely determined. Knowing all the facts, it presented its claim for the amount it stated to be correctly due it to the disbursing officer, received and receipted for the amount thus billed, and closed the transaction on its books and never at any time made any attempt to have the matter reviewed. It was essential that it should do this if it was dissatisfied with the rate which the Government had been paying and would continue to pay, as it well knew.

United States v. *Adams*, 7 Wall, 463, we think, is applicable to this case. It is true in that case the claim was submitted to a board, but the board had no final authority nor could submission of the claim to that board have been compelled. In the present case there was a forum available to claimant at all times for the determination of any claim it might make. Having made out and submitted its claim to a disbursing officer and received payment in full, it can not be presumed that it intended to split up its claim and later submit another item of it to the auditor or comptroller or to a court. It could and must have done this at the time it presented and submitted its original claim. As stated by the court in the *Adams case* at page 481—

> This is not the course of litigation between private parties; they are not allowed to split

> up an entire contract or demand into several parts; and we are not aware of any reason for an exception to the rule in a proceeding against the Government. We can not think that a further hearing before any other tribunal of the same matters was within the contemplation of either party.

In *United States* v. *Child & Company*, 12 Wall. 232, the doctrine of *United States* v. *Adams*, cited above, was approved. In that case a very substantial deduction was made from the amount claimed to be due from the Government. The amount allowed was accepted and receipt in full given. The court held, as in the *Adams case*, that the giving of a receipt in full is of no great significance of itself but that the bar existed on account of the voluntary submission of the claim, the hearing, the final decision thereon, and receipt of the sum found due without formal objection or protest. It is true in this case there was no hearing. But we submit that the principle is applicable because the claimant could have had a hearing at any time. As stated in the *Child case* (p. 243), "but though the claimants might have refused to abide by the decision of the board and sought relief from the Court of Claims or from Congress, they did not do so." Thus in the case at bar the claimants were under no compulsion whatever to present claims for a less amount than they thought due nor to accept payment for the same. They did this, however, without protest. How can they have any higher right than if the claim had been presented in the

full amount to the auditor or comptroller and the deductions, which claimant itself made, had been made by the auditor or comptroller and claimant had then receipted in full without protest. If claimant takes the view that there was a dispute between it and the Government as to the amount due, then the case against it is even stronger, for the amount received and receipted for by claimant without protest would be treated as compromise. It is apparent that if claimant had presented the bill for full rates it would have been disputed by the Government. Claimant, according to its statement, did not present the bills in such amount because it knew the Government would dispute them. Therefore it acquiesced in the Government's view, and by accepting payment and by failure to indicate in any way that it claimed a larger amount settled its claims.

In the case of *Railroad Company* v. *United States*, 103 U. S. 703, the claimant accepted adjustments made by the Postmaster General in amounts less than it claimed it was entitled to, making no objection or protest to the amounts paid. The Court of Claims held that the company was estopped from afterwards asserting its right to recover such additional amounts. The Supreme Court says (p. 704):

> In this we think the Court of Claims was right. It must be held to have known on what basis of weight and distance these adjustments were made. They were made frequently, and the sums which, by those adjust-

ments, were due to each company were paid monthly or quarterly.

If the claimant, during all this time, stood by contentedly and saw the money which it now claims paid to the other company, and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover, and thus make the Government pay twice. For the time the mails were carried after this notice or assertion of the present claim it has recovered judgment, and the Government has not appealed. For what it lost by its neglect in making claim on these settlements when receiving payment, it must submit to loss.

In *Central Pacific Railroad* v. *United States*, 164 U. S. 93, the railroad company had transported post-office inspectors, under Regulations of the Post Office Department, without compensation, for a number of years; and had presented its accounts to the Government and had them settled without making any claim for compensation for such transportation. The court states, pages 99–100:

Whether the services for which the company has been paid were performed under the Act of 1862 or under the Revised Statutes, the material fact is that the company has claimed and been awarded compensation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for services connected with the transportation of post office inspectors. Such omission is further evidence of waiver.

The court also states on page 99:

> One of the material facts lacking in the case at bar was present in the case cited, viz, the continuous claim on the part of the company as to its right, its ever-present dispute with the Government in regard to the correctness of the claim, and its protest against the Government's construction of the law. Instead of that we have absolute silence on the part of the claimant here for many years and a peaceful acquiescence in the demand made by the Government for the free transportation of these officials.

In *United States* v. *Garlinger*, 169 U. S. 316, an inspector at the port of Baltimore after his employment had ceased brought suit to recover compensation additional to what he had been paid. The court states (p. 323):

> We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of time, and were received without objection or protest, and where there is no pretense of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.

The case of *Chicago & North Western Railway Company* v. *United States*, 104 U. S. 680, relied upon by claimant, illustrates one of the fatal defects in claimant's case. In that case the company was notified of reductions from the compensation to which it was entitled under its contract; it protested against the reductions being made, but they were nevertheless made by the department. It was forced to carry the mails at a compensation lower than that provided by its contract; it protested against the deduction and claimed that it was entitled under the law and its contract to a definite amount which could not be decreased. This is far different from the case at bar.

Claimant relies on the cases of *Pickley* v. *United States*, 46 C. Cls. 77; *Great Northern Railway Company* v. *United States*, 42 C. Cls. 234; and *James B. Finney* v. *United States*, 32 C. Cls. 546. All of these cases were cited in the court below, and were held not applicable. As the *Baltimore & Ohio case* and the present case are both later than the cases cited, it would seem that even had they been applicable, they were not followed.

Claimant's theory, sought to be established by these cases, is that unless a dispute exists, payment of a less sum than is admittedly due can not preclude the creditor from afterwards suing for the balance. It is true that in the present case there was no existing dispute consisting of claims and denials. But claimant says it knew what the Government would pay and that is was useless to ask more. If it claimed

more than it knew the Government would pay, then it knew its claim was disputed. If it did not make this claim, then it clearly acquiesced in the Government's view and settled its account. The Government never admitted, nor was it suggested by claimant, that any amount in excess of what the Government was willing to pay was or might be due. In the cases claimant relies on an admitted amount was due and the claimant was paid and receipted for a less amount. Here claimant was paid and receipted for all that it claimed to be due, knowing full well that if it claimed any greater amount its claim would be disputed.

United States v. *Bostwick*, 94 U. S. 53, is authority directly against claimant. (See p. 67.)

Baird v. *United States*, 96 U. S. 430, is a case very much in point. There Baird had submitted his claim to the Government; it was audited, and a large deduction made; he was informed of the allowance and the reasons therefor, received and receipted for the amount allowed, afterwards suing for the difference. It is stated in the opinion of the court (pp. 431–432):

> It is no doubt true that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration; but it is equally true that, where the debt is unliquidated and the amount is uncertain, this rule does not apply. In such cases the question is whether the payment was in fact made and accepted in satisfaction.

> It is clear that in September, 1864, when this account was first presented to the Government, the amount due was uncertain, because more was then demanded than is now claimed. The counsel for the appellant say, in their argument, that this reduction has been made in the light of the testimony taken in the suit for indemnity. Under such circumstances it was the duty of the auditing officers of the Government to state the account themselves before making payment. This they did, and reported to the claimant the amount found due, with the principles upon which the adjustment had been made. In effect, this was an offer to pay the balance stated in satisfaction of the claim. The acceptance of the money afterwards, without objection, was equivalent to an acceptance of the payment in satisfaction.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *Clark*, 178 U. S. 353, the claim was made that (p. 364) "where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration. *Cumber* v. *Wane*, 1 Strange, 426."

Mr. Justice Fuller, after stating that this rule has been much questioned and qualified, states (p. 365):

> The result of the modern cases is that the rule only applies when the larger sum is liquidated and when there is no consideration whatever for the surrender of part of it;

> and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it.

Then follows a review of the cases, at the end of which it is stated (pp. 368–369):

> Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as an aquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. [Citing authorities.]

Clearly claimant's case is very far without the general rule. The "larger sum" not only was not and is not liquidated; it was never even suggested. If it had been, it would immediately have been unliquidated by absolute dispute. Can one say an undisputed amount is due him because he concealed his claim, knowing it would be disputed if advanced? So far as claimant is concerned, if it really thought it had a claim prior to the decision in the *Chicago, Milwaukee & St. Paul case*, it knew its claim was disputed; therefore, by accepting payment in full, it settled.

IV.

If, as alleged in the petition, claimant's failure to present bills for the amount to which it now claims to be entitled was due to mistake, the mistake was of law.

The record shows that the bills to the Government were prepared by claimant's own auditors; no deductions were made by the quartermasters or other disbursing officers to whom the bills were presented, but they were paid as prepared and presented by claimant. There was no dispute as to facts; it was known to all concerned that the property was shipped as the baggage allowance of Army officers on change of station. Assuming that the comptroller had definitely held that such shipments were entitled to land-grant rates, that holding must have been based on his construction of the law (Act of March 3, 1863, 12 stat., 772, and other similar acts), i. e., that land-grant railroads—

> shall be and remain public highways, for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States,

and that such baggage was, for the purposes of that Act and the Appropriation Acts, property of the United States. If he was mistaken as to this, claimant was also mistaken. It is inconceivable that it could correctly interpret the law and yet continue for years to render bills for fifty per cent less than it was entitled to under the law. It must have assumed

that the comptroller's construction was correct, otherwise it would have brought suit to test the matter or presented to the auditor or comptroller bills claiming full rates; or, at least, in some manner have protested to some one, or lodged notice somewhere, that it contended it was entitled to full rates and that it presented its bills and received payment without prejudice to its right to demand and enforce payment of the amounts to which it claimed to be entitled. The comptroller's mistake of law, if he made one, was also made by claimant and bars recovery.

> In short, and to sum it up in a word, so far as we can see from this record the transaction was purely voluntary on his part, and that while there was a mistake it was mutual and one of law—a mistake on his part not induced by any attempt to deceive or misrepresentation by the Government officials. (*United States* v. *Edmondston*, 181 U. S. 500, 515.)
>
> It has been held from the earliest days, in both the Federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. (*Utermehle* v. *Norment*, 197 U. S. 40, 56.)

V.

If there was no mistake claimant is concluded by its contract.

In claimant's brief (pp. 26, 27) it is stated:

> The situation here is that *the Government* is endeavoring to avoid responsibility for the balances due claimant under this plea of mistake of law, having set up, by way of defense to this suit, that the claimant rendered its bills for less than the full amount due it by mistake as to its full legal rights in the premises. This claimant denies, and there is no finding by the court to any such effect. On the contrary, the fair presumption from what the Court of Claims said in its opinion, and from the allegations of the petition, is that claimant was not laboring under any mistake as to its legal rights, but merely rendered its bills at land-grant rates because it knew the disbursing and accounting officers of the Government, following the comptroller's views and decisions would not pay full commercial rates therefor, although in some instances, and probably at first, it or some of its officers might not have known that the property shipped was not Government property, which would be a mistake of fact.

That is, the Government presented certain property to the railroad for shipment, stating the rate it would pay for such shipment; the railroad received the property, transported it, presented its bill for the exact amount which the Government had notified it would pay, certified that said bill was correct, and receipted for the payment for the same. It made no

protest that it was entitled to a higher rate; it made no claim of any kind for a higher rate; it lodged no notice of any kind anywhere that it was dissatisfied with the rate paid or that it ever had any intention of claiming any other or higher rate. It did this not only with one shipment but with 176 shipments (Finding VII, R. 15) during the six years immediately preceding the filing of the petition in this case and undoubtedly for many more prior to that time. The Court of Claims finds (Finding VI, first paragraph, R., p. 12, and last paragraph, top of p. 15):

> In rendering its vouchers to the defendant for the transportation referred to in this case the claimant company made deductions on account of land grant from the amounts which would have been due therefor at commercial or tariff rates, and claimed only the balance, accepting payment in the sums so ascertained and claimed without protest.
>
> For the transportation here involved and for like transportation theretofore, claims for which were stated in the same way, the plaintiff company and its predecessor company, whose properties, franchises, and accounts it acquired charged upon its books the net amounts determined as above stated and claimed in its vouchers and no more, and upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded as (quoting the language of the company's auditor) "behind us."

The court further finds (last paragraph Finding V, R., p. 12):

> It is not shown that plaintiff was ever deceived or misled as to the character of these shipments, and the evidence does not justify a finding that plaintiff's officer charged with the duty of presenting and collecting claims for the transportation here involved ever believed or had reason to believe that the property transported was Government-owned property.

There is no allegation or finding to the effect that claimant was compelled in any way to accept this property and transport it for the rate named. Therefore claimant, having rendered this service without compulsion, knowing what the Government intended to and would pay for the same, having presented bills for this exact amount, and upon payment of said bills having closed each account on its books without even any notation thereon that the account was open or that there was a balance claimed to be due, is now precluded from asserting any different or other claim. A contract was made and carried out, both parties knowing the amount that would be paid for the services required by the contract, which amount was paid and receipted for. The fact that claimant might have charged and collected a larger amount is immaterial. It did not do this, but performed the services without compulsion, knowing what it was to receive for the same and receiving that amount without any protest. The case is fully covered by the decisions of this court in *Eastern Railroad Company* v. *United States*, 129 U. S. 391; *Delaware, Lackawanna & Western Railroad Company* v. *The United*

States, 249 U. S. 385; *New York, New Haven & Hartford Railroad Company* v. *The United States,* 251 U. S. 123; and the *Mail Divisor Cases,* 251 U. S. 326.

VI.

The request for additional findings of facts is improperly before the court; it is also without merit.

Rule 5 of this court, adopted December Term 1869 (9 Wall., VII) (claimant's brief p. 5), was superseded by present rule 5, adopted October Term 1907, 210 U. S. 507, which reads:

> In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

Rule I (210 U. S. 505) provides what shall constitute the record on appeal.

The stipulation that the motion for amended and additional findings of fact might be considered as a part of the transcript of the record was made, on the part of the Government, in view of the approved practice under which claimant could move for a remand to the Court of Claims for additional findings and such motion be considered by the court on submission of the case; that is, the Government is willing to regard the matter as if a motion for remand had been made.

It is submitted, however, that the requests are without merit and that the case is fully covered by

the facts as found. Of course, in so far as the motion tends to request the Court of Claims to change findings made it is futile, as the findings are conclusive.

The proposed amendment to Finding VI is covered by Findings VI (R. p. 2–15) and IX (R. p. 17–18).

The request is, in fact, for the Court of Claims to change a negative to a positive finding. The court has found the facts, and neither they nor the statements of the company's auditor as to his mental reservations in any way substantiate the conclusion which claimant asks to be incorporated in Finding VI as an amendment.

Proposed additional finding of fact X is rather an argument that certain conclusions should follow from facts found. The Court of Claims has found the facts which show that the question in dispute in this case is not and never was a matter of accounting. Its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative.

Proposed additional finding of fact XI is a request to find evidence. This is contrary to the rules. Also the evidence asked to be found is entirely immaterial.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANK DAVIS, JR.,
Assistant Attorney General.

JANUARY, 1921.

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SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad and Navigation Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[March 7, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

This action brought by appellant is for the recovery of certain balances amounting to the sum of $4,288.01 being the difference between the amounts paid at certain rates for transportation of the effects of Army officers changing stations and those which it is alleged were legally chargeable.

The Court of Claims adjudged that appellant was not entitled to recover and dismissed its petition. The cost of printing the record in the case was awarded to the United States.

There were findings of fact which show that the rates were presented for payment to the proper accounting officers of the Government in the regular way and payments were made by the disbursing officers of the Government on vouchers certified to be correct and presented by appellant. The rates so presented and paid were at rates for such transportation over land-grant roads fixed in certain agreements known as the "Land-grant equalization agreements" by which, to quote from the findings, "the carriers agreed, subject to certain exceptions, not material to be noted, to accept for transportation all property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement." That is, such freight was accepted by the carriers without prepayment of the charges therefor upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance as provided in the

Railroad Land-grant Acts. It is manifest, therefore, that the commercial rates were higher than the land-grant rates, and this action is to recover the difference between them and the land-grant rates presented for payment, as we have said, by appellant, and paid by the transportation officers of the Government.

After stating the action to be "for the recovery of various amounts aggregating $4,288.01, in addition to those paid on account of 176 items of freight transportation furnished to and paid for by the United States" the Court by Mr. Justice Downey said, the action "is for a sum as to each item of transportation in addition to that already claimed and paid as claimed for the same items and is not for any other or different or additional service nor for omitted items". And further, "the case therefore involves not only the question of the applicability of land-grant rates to this class of freight transportation, a question already decided adversely by this court, but it involves further questions as to the right, under the circumstances of the case, to now recover amounts not then claimed".

The decision referred to is *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 50 Ct. Cls. 412, and the ground of its ruling was that the freight transported was not the property of the United States, it being the effects of Army officers and, therefore, was not entitled to land-grant deductions but was subject to the commercial tariff. Necessarily, therefore, the pending case must turn on other questions for the property transported was the property of Army officers and subject, therefore, independently of other considerations, to the commercial rates. Appellant in the present case was paid sums less than those rates and there is left for consideration only its present right to recover the difference between them and the land-grant rates, the latter being those that were paid.

The Government, however, is not inclined to that limitation of the issue, and attacks the ruling of which it is the consequence, and repeats the contention decided against it in that case, and again insists that the property transported was Government property and entitled to land-grant rates and all else is irrelevant. To this appellant replies that the Government did not appeal from the decision and must be considered as having accepted it. The effect is rather large to attribute to mere non-action, but we need not make further comment upon it because we think the decision

of the Court of Claims was correct. The personal baggage of an officer is not property of the United States and as such entitled to transportation at land-grant rates, and we are brought to the grounds of recovery urged by appellant.

There are reasons for and against them. The assertion is of a right of action and recovery against apparently a concession during a long course of years to an explicit and contrary assertion by the Government. Appellant attempts to explain the concession or, let us say, its non-action, as the compulsion of circumstances, and of a belief of the futility of action, and now urges that it never intended to relinquish but always intended to assert its right. The record, however, has much against this explanation, or that can be accommodated to it, if we may ascribe to appellant the usual impulses and interest that influence men.

It "and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books" the transportation charges at land-grant rates and not at regular commercial rates, so rendered its bills to the Government, and received payment without protest or the assertion of a greater compensation. And there was prompting to protest and such assertion. In 1904, according to a finding, "the Union Pacific stated a claim against the United States at regular tariff rates for transportation of household goods and professional books of an officer of the Army over the railroad bridge at Quincy, Illinois." The claim was disallowed and thereafter the Union Pacific stated its accounts at land-grant rates. It is also found that in 1891 and in 1904 there was conversation between the Comptroller of the Treasury and counsel in regard to the rulings of the Comptroller though not, the Court of Claims says, to a claim then pending before the officer. Appellant, however, was not stirred to either opposition or protest by the incident with the Union Pacific or the conversation with the Comptroller but continued to render its accounts at land-grant rates, and accepted payment without opposition or action until the decision of the Court of Claims in *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States, supra.*

Counsel seem to make a merit of this uncomplaining and unresisting acquiescence and observe that the Government by it obtained the advantage of the plea of the statute of limitations. The fact is significant. It is inconsistent with the reservation of a right and an intention to subsequently make a judicial assertion

of it. Creditors are not usually so indulgent and the appellant had remedies at hand. The courts were open to it, certainly protest was open to it. Its explanation for this non-action is not satisfactory. "It is advised and believes", is its allegation, and now its contention, that "its auditors and agents were led and constrained to render its bills and vouchers . . . at tariff rates with land-grant deductions, because the shipments were for the Quartermaster's Department and upon *Government* bills of lading which in terms are only applicable to 'Government property' and 'public property', *and also (because) The Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates*", and that it did not intend to waive its right to payment in full or to sue, "if so advised" for the balances due "so far as the same were not barred by the statute of limitations."

The italics are counsel's and we repeat them as they give emphasis to counsel's conviction of the justification of the excuse. We do not share it. The mere mechanism of the bills of lading or their false designations of the property transported could not have imposed on anybody, certainly not on "the auditors and agents" of a railroad company, and the decisions of the Comptroller were as much open to dispute then as now and resort to suit an inevitable prompting, and yet, we have seen, the statute of limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its "auditors and agents" were not ignorant of affairs, nor unpractised in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the the rights of the companies they represent. We do not say this in criticism, for such is their duty, the necessary condition of their places.

We are forced, therefore, to conclude that appellant's non-action was deliberate, based upon a consideration of its advantages, with no thought of ultimate assertion against the decision of the Government until stirred to acquisitiveness by the decision in the

Chicago, Milwaukee & St. Paul case, a decision which we may say in passing, was declared by the Court of Claims to have been improvidently given. *B. & O. R. R. Co.* v. *United States*, 52 Ct. Cls. 468.

The case therefore falls within the rulings of *United States* v. *Bostwick*, 94 U. S. 53; *Baird* v. *United States*, 96 U. S. 430; *Railroad Company* v. *United States*, 103 U. S. 703; *Central Pacific Ry.* v. *United States*, 164 U. S. 93. And they have supplemental force in *United States* v. *Edmondston*, 181 U. S. 500; *Untermehle* v. *Norment*, 197 U. S. 40.

These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the concessions of appellant to the action of the accounting officers, and the Court of Claims makes this a point in its decision. The Court said that from the "long continued uniform course of action by" appellant "for a long period of years", "it had no intention of claiming anything more as to these transactions than that claimed in the certified vouchers and paid." And added, "All the facts justify this conclusion, for a course of conduct is more potent than assertions of belief enacted on. But if such a conclusion were otherwise subject to question it appears from the evidence that plaintiff's (appellant) charge upon its books was only of the amount claimed in its vouchers and that when that amount was paid 'the transaction was behind us.' The quoted language is the language of plaintiff's auditor."

In explanation of this, it may be said, and in contradiction of its implication, appellant requested findings by the court that the transaction of the appellant and its predecessor company "was regarded by the auditing department of the company as closed, so far as they were concerned, but as subject to subsequent adjustment or suit in court if subsequently found to be incorrect." And further, that the Government considered the accounts between "the carriers as in the nature of running accounts, subject to correction as the occasion arises, in the light of the law and the facts." And it is contended that the evidence supports such conclusion. This is disputed by the Government, and it is doubtful. The Government concedes that a motion to remand the case for additional findings has foundation in the record but contends "that

the requests are without merit and that the case is fully covered by the facts found." And adds, "of course, in so far as the motion tends to request the Court of Claims to change findings made it is futile, as the findings are conclusive."

The Government further urges that the proposed amendment to Finding VI is covered by Findings VI and IX, and is only a request "to change a negative to a positive finding"; that the amendment to Finding X is "rather an argument that certain conclusions should follow from facts found" and that "its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative." The amendment to Finding XI, is, the Government says, "a request to find evidence" which is contrary to the rules, and besides the evidence is immaterial.

We concur with the Government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the Government as final, and not as tentative.

Judgment affirmed.

Mr. Justice PITNEY and Mr. Justice CLARKE concur in the result.

A true copy.

Test:

Clerk Supreme Court, U. S.